

Western New England University School of Law

Digital Commons @ Western New England University School of Law

Faculty Scholarship

Faculty Publications

2016

"As Who They Really Are": Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports

Erin E. Buzuvis

Western New England University School of Law, ebuzuvis@law.wne.edu

Follow this and additional works at: <http://digitalcommons.law.wne.edu/facschol>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Erin Buzuvis, "As Who They Really Are": Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports, 34 L. & INEQ. 341 (2016).

This Article is brought to you for free and open access by the Faculty Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

“As Who They Really Are”: Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports

Erin E. Buzuvis[†]

Introduction

When Caitlyn Jenner received the Arthur Ashe Award for Courage at the 2015 ESPYs,¹ she used the opportunity of her highly publicized acceptance speech to focus public attention on “the young trans athletes who are out there,” and urged the public to embrace transgender athletes’ wish to participate in sports “as who they really are.”² Jenner, who was once known as the “world’s greatest athlete,” and is today “the most famous transgender woman in the world,”³ has a unique platform from which to call for such inclusion on behalf of present and future athletes. But creating such inclusive opportunities will require more than just the attention of a well-known transgender athlete like Jenner. It will require the engagement of leaders and stakeholders in local, state, and national sport organizations.

[†]. Professor Buzuvis researches and writes about gender and discrimination in sport, including such topics as the interrelation of law and sports culture, intersecting sexual orientation and race discrimination in women’s athletics, retaliation against coaches in collegiate women’s sports, the role of interest surveys in Title IX compliance, participation policies for transgender and intersex athletes, and Title IX and competitive cheer. Additionally, she is a co-founder and contributor to the Title IX Blog, an interdisciplinary resource for news, legal developments, commentary, and scholarship about Title IX’s application to athletics and education. Professor Buzuvis currently serves as the Director of the Center for Gender & Sexuality Studies at Western New England University School of Law. She also teaches courses on administrative law, employment discrimination, Title IX, torts and property. Prior to joining the faculty at Western New England University School of Law in 2006, she clerked for Judge Thomas Ambro of the Third Circuit and practiced law at Goodwin Procter in Boston. She also spent time as a Visiting Professor at the University of Iowa College of Law.

1. The ESPYs, or “Excellence in Sports Performance Yearly Awards” present accolades to honor athletes for various achievements. See *ESPYs*, ESPN, <http://www.espn.com/espys/2016/> (last visited June 20, 2016).

2. Caitlyn Jenner, Arthur Ashe Award for Courage Recipient, Acceptance Speech at the 2015 ESPY Awards (July 15, 2015) (transcript available at <http://time.com/3960279/caitlyn-jenner-full-speech-espy-espys-text-transcript/>).

3. Katy Steinmetz, *Caitlyn Jenner: The World’s Most Famous Transgender Woman Shines Her Spotlight on the Fight for Equality*, TIME, Dec. 21, 2015, at 144, 146.

This Article aims to assist the effort of inclusion by helping decision-makers in scholastic athletics and youth sports understand why and how to create inclusive policies. This Article begins with an overview of policies that have already been adopted by interscholastic athletic associations and sport governing bodies that regulate youth sport programs.⁴ The Article then critiques policies that categorically exclude and otherwise impose limitations on transgender persons who seek to participate in sports in a manner consistent with their gender identities⁵—what this Article will refer to as “gender-consonant participation.” The Article will then suggest ways to maximize inclusivity⁶ and conclude with a model policy that seeks to implement those suggestions.⁷

I. Transgender Participation Policies: The Present Landscape

Millions of young people in the United States play sports in school-run extracurricular programs or as part of non-scholastic youth sports organizations.⁸ Whether young transgender athletes are permitted to partake in these opportunities “as who they really are”⁹ depends on the policy of the interscholastic athletic association to which their school belongs, or, for non-scholastic activities, the policy of the national governing body of the sport in question. In some contexts, policies restrict a transgender participant’s opportunity to participate according to anything other than the sex that person was assigned at birth.¹⁰ These policies effectively prohibit a transgender athlete from participating in a manner consistent with that person’s gender identity.¹¹ In contrast, other policies permit transgender athletes’ gender-consonant participation,¹² though some impose various limitations and exceptions to such opportunities and use different procedures to validate athletes’ affirmed genders.¹³ The patchwork of policies, first for interscholastic sports and then for

4. *See infra* Part I.

5. *See infra* Part II.

6. *See infra* Part III.

7. *See infra* Part IV.

8. Bruce Kelley & Carl Carchia, “Hey, Data Data—Swing!,” ESPN (July 16, 2013), http://espn.go.com/espn/story/_/id/9469252/hidden-demographics-youth-sport-s-espn-magazine.

9. Jenner, *supra* note 2.

10. *See infra* Part I.A.1.

11. *See infra* Part II.

12. *See infra* Part I.A.4.

13. *See infra* Parts I.A.2, I.A.3.

non-scholastic youth sports, is as follows.

A. *State Interscholastic Athletic Associations*

Each state has an association of voluntary member schools which coordinates and regulates athletic competition and other activities for students of the various members.¹⁴ Their bylaws operate as a contract that obligates the schools, as a condition of membership, to comply with the association’s uniform requirements about matters such as the season of competition for various sports, the rules by which the games are played, and the eligibility of students to compete.¹⁵ A total of thirty-five associations have adopted policies addressing participation by transgender athletes, and these policies vary widely.¹⁶

1. Birth Certificate Policies

The first major difference among state athletic association policies is that some permit transgender students to participate according to their gender identity, while others limit participation to the sex identified on one’s birth certificate. Gender identity is one’s internal sense of self as “male” or “female,” or in some cases, both or neither.¹⁷ Everyone has a gender identity, and, for the majority of people, that identity aligns with their so-called “biological sex.”¹⁸ One’s biological sex is determined at birth on the basis of factors such as chromosomes, hormones, and genital and other physical characteristics.¹⁹ A transgender person is, by definition, one whose gender identity is not consistent with the person’s birth-assigned sex.²⁰ Most individuals become aware of their gender identity early in life.²¹ Therefore, a policy that limits

14. See NAT’L FED’N OF STATE HIGH SCH. ASS’NS, NFHS HANDBOOK 2015–16, at 18 (2015), <https://www.nfhs.org/media/1015824/2015-16-nfhs-handbook.pdf>.

15. See *id.* at 20.

16. See *infra* Parts I.A.1; I.A.2.; I.A.3; I.A.4.

17. *Understanding Gender*, GENDER SPECTRUM, <https://www.gender-spectrum.org/quick-links/understanding-gender/> (last visited Jan. 3, 2016) [hereinafter *Understanding Gender*].

18. Many believe that gender identity also has a biological basis, so it may not be accurate to use the phrase “biological sex” in contradistinction to gender identity. See M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights*, 39 VT. L. REV. 943, 980–89 (2015). For this reason, this Article will use the concept of sex assigned at birth—also known as “natal sex”—to refer to the aspects of one’s sex, other than gender identity, that are unmodified by hormonal or surgical intervention.

19. *Understanding Gender*, *supra* note 17.

20. *Id.*

21. It is possible for children as young as two- and three-years-old to express evidence of what later might be understood as transgender identity. STEPHANIE BRILL & RACHEL PEPPER, *THE TRANSGENDER CHILD* 61–62 (2008).

young people's opportunities according to their birth-assigned sex necessarily precludes transgender youth from gender-consonant participation, that is, playing sports "as who they really are."²²

States whose interscholastic athletic associations have adopted birth-certificate policies currently include Alabama,²³ Georgia,²⁴ Kentucky,²⁵ New Mexico,²⁶ North Carolina,²⁷ and Texas.²⁸ As a legal matter, in all of these states, transgender individuals can amend the sex designation on their birth certificates to match their gender identities.²⁹ However, all but one³⁰ of these states will only issue an amended birth certificate in cases where the person petitioning for the change has undergone genital reconstructive surgery.³¹ Most transgender youth are

22. Jenner, *supra* note 2.

23. ALA. HIGH SCH. ATHLETIC ASS'N, AHSAA HANDBOOK 2015–2016 (2015), <http://www.ahsaa.com/LinkClick.aspx?fileticket=NpdM99yaOTs%3d&tabid=130&portalid=0>.

24. GA. HIGH SCH. ASS'N, CONSTITUTION AND BY-LAWS 2015–2016, at 16 (2015), <http://www.ghsa.net/sites/default/files/documents/Constitution/Constitution2015-16Complete.pdf>.

25. KY. HIGH SCH. ATHLETIC ASS'N, 2015–2016 HANDBOOK § 4, at 26 (2015) [hereinafter KY. POLICY], <http://khsaa.org/Publications/Handbook/20152016/20152016fullhandbook.pdf>.

26. N.M. ACTIVITIES ASS'N, SECTION VI: ELIGIBILITY (BYLAWS), at VI-1 (2016), http://www.nmact.org/file/Section_6.pdf.

27. See Matt Comer, *New High School Athletics Gender Rule May Cause Discrimination*, QNOTES (May 8, 2014), <http://goqnotes.com/29224/new-high-school-athletics-gender-rule-may-cause-discrimination/>.

28. In October 2015, Texas's University Interscholastic League's (UIL) Standing Committee on Policy moved for the UIL Legislative Council to pass a proposed birth-certificate policy. UNIV. INTERSCHOLASTIC LEAGUE, REPORT OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE LEGISLATIVE COUNCIL STANDING COMMITTEE ON POLICY 8–10 (2015), http://www.uil texas.org/files/media/2015_Policy_Proposals2.pdf (proposing an amendment to the UIL CONSTITUTION AND CONTEST RULES §§ 360, 361). Texas superintendents approved the policy in a spring 2016 referendum. See UNIV. INTERSCHOLASTIC LEAGUE, SPRING 2016 REFERENDUM BALLOT 3 (2016), http://www.uil texas.org/files/policy/2016_spring_referendum_ballot.pdf. The policy will become official on August 1, 2016. Kaih Collier, *Birth Certificates To Determine Student-Athletes' Gender*, TEX. TRIBUNE (Feb. 26, 2016), <https://www.texastribune.org/2016/02/26/birth-certificates-determine-student-athlete-gende/>.

29. Comer, *supra* note 27.

30. Texas does not specifically require surgical intervention to apply for a birth certificate amendment. See TEX. HEALTH & SAFETY CODE ANN. § 192.011(b) (West 2015). However, "[c]urrent case law and evidence indicates that Texas officials and judges are adverse to issuing the necessary court orders." *ID Documents Center: Texas*, NAT'L CTR. FOR TRANSGENDER EQUALITY (Feb. 1, 2016), <http://www.transequality.org/documents/state/texas>.

31. See ALA. CODE § 22-9A-19(d) (2015); GA. CODE ANN. § 31-10-23(e) (West

ineligible for this intervention.³² Moreover, not even a majority of transgender adults elect to undergo those procedures.³³ Therefore, in states with birth-certificate policies, transgender youth are effectively limited to participating in athletics according to the sex identified on their original birth certificates, which will not be consistent with their gender identities. Notably, Kentucky’s interscholastic athletic association policy seems to preclude even the theoretical possibility of participating according to one’s amended birth certificate, as it tells athletes that eligibility is based on one’s “*gender . . . assigned at birth*.”³⁴

2. Hormone Policies

Among the interscholastic athletic association policies that do permit gender-consonant participation, some differentiate themselves by requiring a transgender student to undergo hormone treatment as a condition for participation. Typically, such policies are modeled on the policy of the National Collegiate Athletic Association (NCAA), which permits transgender female athletes to compete on women’s teams after one year of treatment that suppresses endogenous male hormones, also known as androgens, including testosterone.³⁵ By contrast, the NCAA policy permits transgender male athletes to participate on men’s teams without requiring hormones; but at the same time, the policy disqualifies them from women’s teams as soon as they commence hormone treatment with exogenous testosterone.³⁶

2015); KY. REV. STAT. ANN. § 213.121(5) (West 2015); N.M. STAT. ANN. § 24-14-25(D) (West 2015); N.C. GEN. STAT. ANN. § 130A-118(b)(4) (West 2015). The surgical interventions required in these states are commonly referred to as “sex reassignment surgery,” but this label is not consistent with the understanding of gender identity as the core component of sex. Levasseur, *supra* note 18, at 988 (“Transition is not altering one’s sex, but affirming one’s underlying gender identity.”).

32. See ELI COLEMAN ET AL., WORLD PROF’L ASS’N FOR TRANSGENDER HEALTH (WPATH), STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE 21 (2012) [hereinafter WPATH], http://www.wpath.org/uploaded_files/140/files/Standards%20of%20Care,%20V7%20Full%20Book.pdf (7th version) (“Genital surgery should not be carried out until . . . patients reach the legal age of majority to give consent for medical procedures in a given country . . .”).

33. JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 26 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf (reporting that thirty-three percent of transgender survey respondents had surgically transitioned).

34. KY. POLICY, *supra* note 25, § 4, at 26.

35. PAT GRIFFIN & HELEN CARROLL, NCAA INCLUSION OF TRANSGENDER STUDENT-ATHLETES 13 (2011) [hereinafter GRIFFIN & CARROLL, NCAA INCLUSION], <http://www.ncaapublications.com/productdownloads/11INCL.pdf>.

36. The NCAA allows transgender male athletes who are taking testosterone to

State athletic associations with policies similar to the NCAA's include Idaho,³⁷ Missouri,³⁸ Oklahoma,³⁹ Oregon,⁴⁰ and Wisconsin.⁴¹ A hormone policy is presently under consideration in Nebraska.⁴² The policy in Ohio is similarly hormone-based, but uniquely provides that the hormone requirement could be waived in cases where the athletic association commissioner is convinced "by way of sound medical evidence that the transgender female student athlete does not possess physical (bone structure, muscle mass, testosterone, hormonal, etc.) or physiological advantages over genetic females of the same age group."⁴³

3. Gender-Consonant Policies That Contain Exceptions and Limitations

Several state athletic associations permit a transgender student's gender-consonant athletic participation only on a case-by-case basis. In Arizona,⁴⁴ Michigan,⁴⁵ and Pennsylvania,⁴⁶ a

qualify for a "medical exception" for what would otherwise violate its ban on performance-enhancing drugs. *Id.* at 12.

37. IDAHO HIGH SCH. ACTIVITIES ASS'N, RULES AND REGULATIONS 2015–2016, at 87 (2015) [hereinafter IDAHO POLICY], <http://www.idhsaa.org/manage/articlefiles/56-15-16%20Rules%20and%20Regs.pdf>.

38. MO. STATE HIGH SCH. ACTIVITIES ASS'N, 2015–2016 OFFICIAL HANDBOOK 136 (2015) [hereinafter MO. POLICY], <http://www.mshsaa.org/resources/pdf/1516Handbook.pdf>.

39. OKLA. SECONDARY SCH. ACTIVITIES ASS'N, BOARD OF DIRECTORS' POLICIES 2015–2016, at 82–83 (2015) [hereinafter OKLA. POLICY], http://www.ossaaonline.com/docs/2015-16/MiscForms/MF_2015-16_BoardPolicies.pdf?id=7.

40. OR. SCH. ACTIVITIES ASS'N, 2015–2016 OREGON SCHOOL ACTIVITIES ASSOCIATION HANDBOOK 98 (2015) [hereinafter OR. POLICY], <http://www.osaa.org/docs/handbooks/osaahandbook.pdf>.

41. WIS. INTERSCHOLASTIC ATHLETIC ASS'N, TRANSGENDER PARTICIPATION POLICY 2 (2013) [hereinafter WIS. POLICY], http://media.wix.com/ugd/2bc3fc_95ec28cdb3ee4df89ee624229b9caa48.pdf.

42. Margaret Reist, *NSAA Advances Strict Transgender Participation Policy*, LINCOLN J. STAR (Dec. 9, 2015, 8:15 PM), http://journalstar.com/news/local/education/nsaa-advances-strict-transgender-participation-policy/article_48226619-7631-5cc2-8350-24329cb9c99c.html.

43. OHIO HIGH SCH. ATHLETIC ASS'N, TRANSGENDER POLICY 3 (2014), <http://www.ohsaa.org/eligibility/TransgenderPolicy.pdf>.

44. ARIZ. INTERSCHOLASTIC ASS'N, 2015–2016 CONSTITUTION & BYLAWS 35 (2015), <http://aiaonline.org/files/14046/2015-2016-aia-constitution-bylaws-book.pdf>.

45. MICH. HIGH SCH. ATHLETIC ASS'N, REPRESENTATIVE COUNCIL MEETING 6 (2012), http://media.wix.com/ugd/2bc3fc_80d4a5e560084ce4949dce8d7cefcff1.pdf.

46. PA. INTERSCHOLASTIC ATHLETIC ASS'N, 2015–2016 CONSTITUTION AND BYLAWS 35 (2015) [hereinafter PA. POLICY], <http://www.piaa.org/assets/web/documents/Handbook%20-%20Section%20I%20-%20Constitution%20and%20By-laws.pdf>.

transgender student must seek the permission of school or association officials, depending on the policy. These policies

provide little or no criteria to guide or limit the decision-maker’s authority and thus allow for the possibility that a transgender athlete could be excluded for arbitrary reasons.

Athletic associations in Maine⁴⁷ and New Jersey⁴⁸ permit transgender students to participate according to their gender identities, except in cases that threaten to compromise the safety or competitive balance of other athletes. Athletic associations in Illinois⁴⁹ and Kansas⁵⁰ permit schools to disqualify a transgender athlete from gender-consonant participation due to “Gender Identity related advantages.” Maryland’s interscholastic athletic association allows transgender students to participate according to their gender identities, rather than the sex classifications on students’ birth certificates or school records.⁵¹ Yet elsewhere in the policy, a list of “[g]uiding [p]rinciples” for school districts invites them to factor in “tremendous variation among individuals in strength, size, musculature, and ability.”⁵² This provision interjects ambiguity into the policy, as it is unclear whether schools may limit the athletic opportunities of transgender students based on officials’ impressions of transgender students’ strength, size, musculature, and ability.

In Nevada⁵³ and New York,⁵⁴ athletic associations have

47. ME. PRINCIPALS’ ASS’N, 2013–2014 HANDBOOK 19 (2013) [hereinafter ME. POLICY], <http://www.mpa.cc/images/pdfs/handbook15forwebsite.pdf>.

48. N.J. STATE INTERSCHOLASTIC ATHLETIC ASS’N, WHAT’S NEW FOR 2015–2016, at 83–84 (2015) [hereinafter N.J. POLICY], <http://www.njsiaa.org/sites/default/files/document/15-16%20NJSIAA%20Constitution%2C%20Bylaws%2C%20R%20%26%20R.pdf>.

49. ILL. HIGH SCH. ASS’N, ADMINISTRATIVE PROCEDURES, GUIDELINES AND POLICIES 119–20 (2015) [hereinafter ILL. POLICY], <http://www.ihsa.org/documents/forms/2015-16/IHSA%20Policies%202015-16.pdf>.

50. KAN. STATE HIGH SCH. ACTIVITIES ASS’N, KSHAA POLICY FOR TRANSGENDER STUDENT PARTICIPATION 1 (2015) [hereinafter KAN. POLICY], <http://www.kshsaa.org/Public/PDF/TransgenderPolicyRecommendations.pdf>.

51. MD. PUB. SECONDARY SCHS. ATHLETIC ASS’N, MPSSAA TRANSGENDER PERSON GUIDANCE FOR PARTICIPATION IN INTERSCHOLASTIC ATHLETICS (2015) [hereinafter MD. POLICY], <http://media.wix.com/ugd/2bc3fc+c275051cd7b4a48759fcc5c77e34f7fab.pdf>.

52. *Id.* at 2.

53. NEV. INTERSCHOLASTIC ACTIVITIES ASS’N, NIAA GENDER IDENTITY PARTICIPATION POSITION STATEMENT 1 (2014) [hereinafter NEV. POSITION], http://static.psb.in.com/e/f/6n109pv2gzrb5c/NIAA_Gender_Identity_Participation_Position_Statement_1-15-2014.pdf.

54. N.Y. STATE PUB. HIGH SCH. ATHLETIC ASS’N, NYSPHSAA BYLAWS AND ELIGIBILITY STANDARDS 154–55 (2015) [hereinafter N.Y. POLICY], <http://www.nysphsaa.org/Portals/0/PDF/Handbook/2015-16%20School%20Year/December%202015/ByLaws%20and%20Eligibility%20Stand>

“guidelines” that permit transgender students’ gender-consonant participation. However, the non-mandatory nature of these guidelines permits a school to impose limitations or restrictions on such participation without any penalty or effect on schools’ membership status within the association.⁵⁵

The limitation contained in Iowa’s athletic association policy is unique as well: Only transgender boys—that is, individuals who identify as male who were designated “female” at birth—are eligible to participate in boys’ athletics, allowing them gender-consonant participation.⁵⁶ However, the policy is silent about transgender girls, and thus seems to deny them the same opportunities for gender-consonant participation.⁵⁷

4. Gender-Consonant Policies Without Exceptions or Limitations

Twelve states have adopted the most inclusive policies for transgender students’ gender-consonant participation in school sports: California,⁵⁸ Connecticut,⁵⁹ Massachusetts,⁶⁰ Minnesota,⁶¹ Nevada,⁶² New Hampshire,⁶³ Rhode Island,⁶⁴ Vermont,⁶⁵ Virginia,⁶⁶ and Washington,⁶⁷

ards%20-%20Handbook%2012-21-15.pdf.

55. NEV. POSITION, *supra* note 53, at 1; N.Y. POLICY, *supra* note 54, at 154–55.

56. IOWA HIGH SCH. ATHLETIC ASS’N, 2015–2016 IHSAA HANDBOOK 14 (2015), http://www.iahsaa.org/wp-content/uploads/2013/02/2015_16_Handbook_Final.pdf.

57. *See id.*

58. CAL. INTERSCHOLASTIC FED’N, GUIDELINES FOR GENDER IDENTITY PARTICIPATION (2015), http://static.psbins.com/m/5/0ndq7wwfgh2em9/Guidelines_for_Gender_Identity_Participation.pdf.

59. CONN. INTERSCHOLASTIC ATHLETIC ASS’N, CIAC HANDBOOK 2015–16, at 56 (2015) [hereinafter CONN. POLICY], http://www.casciac.org/pdfs/ciachandbook_1516.pdf.

60. MASS. INTERSCHOLASTIC ATHLETIC ASS’N, GENDER IDENTITY POLICY CLARIFICATION (2014) [hereinafter MASS. POLICY], http://www.miaa.net/gen/miaa_generated_bin/documents/basic_module/GenderIdentityIcon.pdf.

61. MINN. STATE HIGH SCH. LEAGUE, 2015–2016 MSHSL OFFICIAL HANDBOOK: 300.0 ADMINISTRATION OF STUDENT ELIGIBILITY BYLAWS 53 (2015), <http://www.mshsl.org/mshsl/Publications/code/handbook/300%20Bylaws.pdf>.

62. NEV. POSITION, *supra* note 53.

63. N.H. INTERSCHOLASTIC ATHLETIC ASS’N, NHIAA HANDBOOK: BY-LAW ARTICLE III, SPORTS MEDICINE 52–53 (2015), <http://nhiaa.org/PDFs/55105ByLawArticleIIISportsMedicine.pdf>.

64. R.I. INTERSCHOLASTIC LEAGUE, RULES AND REGULATIONS: ARTICLE 1, ORGANIZATION 11–13 (2015), http://www.riil.org/files/8214/3861/6354/ARTICLE_1_ORGANIZATION_2015.pdf.

65. VPA *Activities/Athletics Policies*, VT. PRINCIPALS’ ASS’N, <http://www.vpaonline.org/Page/233> (last visited Mar. 30, 2016).

66. VA. HIGH SCH. LEAGUE, VIRGINIA HIGH SCHOOL LEAGUE, INC. HANDBOOK AND POLICY MANUAL 2015–16, at 108–10 (2015) [hereinafter VA. POLICY], <http://www.vhsl.org/doc/upload/pub-handbook-2015-163.pdf>.

The majority of these policies are modeled on the Washington Interscholastic Athletic Association’s (WIAA) policy, which was the first such policy adopted by an interscholastic athletic association.⁶⁸ Under the WIAA’s policy, transgender students are eligible to participate in athletics according to their gender identities.⁶⁹ The policy outlines a process for verifying the student’s gender identity in the event questions arise.⁷⁰ The process requires an eligibility determination by a “gender identity eligibility committee” convened by the athletic association⁷¹ whose role it is to determine that the student’s gender-identity claim is bona fide.⁷² The policy requires the student to submit documentation of the student’s gender identity to the Committee, although it is permissive about the form that the documentation may take.⁷³ Medical records are not necessary, as the policy permits the student to document his or her gender identity by submitting, for example, “affirmed written statements from [the] student and/or [the student’s] parent/guardian.”⁷⁴ In the event that the committee denies the student’s request for gender-consonant participation, the student may appeal that decision to the association’s executive director.⁷⁵

Some permissive participation policies in this category differ from the WIAA model by limiting the role of the state association in gender-eligibility determinations. For example, the Connecticut Interscholastic Athletic Conference and the Massachusetts

67. WASH. INTERSCHOLASTIC ACTIVITIES ASS’N, 2015–2016 WIAA OFFICIAL HANDBOOK: ELIGIBILITY 31–32 (2015) [hereinafter WASH. POLICY], <http://www.wiaa.com/ConDocs/Con1544/Eligibility.pdf>.

68. See Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 24–25 (2011).

69. WASH. POLICY, *supra* note 67, at 32.

70. *Id.*

71. Such a committee must be comprised of three of the following persons, one of whom must be from the physician or mental health profession category:

A. Physician with experience in gender identity health care and the World Professional Association for Transgender Health (WPATH) Standards of Care.

B. Psychiatrist, psychologist or licensed mental health professional familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care.

C. School administrator from a non-appealing school

D. WIAA staff member

E. Advocate familiar with Gender Identity and Expression issues[.]

Id.

72. See *id.*

73. *Id.*

74. *Id.*

75. *Id.*

Interscholastic Athletic Association both require the student's school to determine that "the expression of the student's gender identity is bona fide and not for the purpose of gaining an unfair advantage in competitive athletics."⁷⁶ Once the school has included that student's name on the roster of a gender-specific sports team, the association defers to the school district's determination.⁷⁷

The Virginia High School League (VHSL) has a gender-consonant participation policy which differs from the WIAA's policy by imposing stricter documentation requirements on a transgender student seeking to exercise that right.⁷⁸ In Virginia, a transgender student must submit: (1) a written statement affirming the student's gender; (2) written statements from individuals such as parents, teachers, or friends affirming the student's gender; (3) a list of treatment and medications related to the student's gender identity; and (4) written verification of the student's gender from a health care provider.⁷⁹ This documentation is presented to a VHSL committee, called the "District Committee," which makes the initial determination of whether the student's asserted gender-identity is "not for the purpose of gaining an unfair advantage in competitive athletics."⁸⁰ However, the District Committee's determination does not take effect until the VHSL Executive Director concurs.⁸¹ If either the District Committee or the Executive Director disagrees with a determination of eligibility, the policy permits the student to appeal the decision to the VHSL Executive Committee.⁸²

B. Non-Scholastic Youth Sports

Organizations other than schools also provide abundant opportunities for youth to participate in sports. Many sport-specific organizations are affiliated with a particular sport's national governing body ("NGB"), and, thus, abide by the NGB's rules for competition and its other policies. Some NGBs have adopted policies regarding participation by transgender athletes.

One such NGB is the United States Soccer Federation

76. CONN. POLICY, *supra* note 59, at 56; MASS. POLICY, *supra* note 60.

77. CONN. POLICY, *supra* note 59, at 56; MASS. POLICY, *supra* note 60.

78. Compare VA. POLICY, *supra* note 66, at 108–10, with WASH. POLICY, *supra* note 67, at 31–32.

79. VA. POLICY, *supra* note 66, at 109.

80. *Id.*

81. *Id.*

82. *Id.*

(USSF), the national governing body for soccer.⁸³ In 2013, the USSF adopted a policy requiring its member organizations—with the exception of professional and national teams—to permit transgender athletes to “register with the gender team with which the player identifies.”⁸⁴ Organizations may only require documentation to confirm that the player’s stated gender “is sincerely held, and part of a person’s core identity,” which may include government-issued documentation or documentation prepared by a health-care provider, counselor, or other qualified professional.⁸⁵ USSF’s largest affiliate is the United States Youth Soccer Association, which boasts over three million members.⁸⁶

Similarly, USA Swimming issued a set of “recommended practices” to its member clubs for governing transgender youth participation.⁸⁷ These recommendations permit gender-identity based participation and have no restrictions or specific documentation requirements.⁸⁸ In addition, the recommendations encourage member clubs to allow transgender athletes to use locker rooms and restrooms according to their identities and to wear “whatever swimsuit is most comfortable for them.”⁸⁹

In contrast, other national governing bodies have adopted more restrictive policies that apply even to youth programs. USA Track and Field, which oversees over 2,000 youth clubs, requires transgender athletes to comply with requirements copied from the International Olympic Committee’s policies in order to compete according to their gender identities.⁹⁰ To compete according to their gender identities, athletes must undergo genital reconstructive surgery and hormone treatment, change their sex

83. *U.S. Soccer Reaching New Heights*, U.S. SOCCER, <http://www.ussoccer.com/about/about-us-soccer> (last visited Apr. 12, 2016).

84. U.S. SOCCER FED’N, USSF POLICY AMENDMENTS AFFIRMED AT JUNE 2013 ANNUAL GENERAL MEETING 2 (2013), http://media.wix.com/ugd/2bc3fc_d4601f281da449648ca4c60d0d81a526.pdf.

85. *Id.*

86. *Key Statistics*, US YOUTH SOCCER, http://www.usyouthsoccer.org/media_kit/keystatistics/ (last visited Jan. 4, 2016).

87. USA SWIMMING, RECOMMENDED PRACTICES FOR THE INCLUSION OF MINOR TRANSGENDER ATHLETES 1–2 (2015), http://media.wix.com/ugd/2bc3fc_2dd9480f771b45a48537f742e35a965c.pdf.

88. *Id.* at 1.

89. *Id.* at 1–2.

90. See *USATF Statement Regarding Transgender/Transsexual Policy*, USA TRACK & FIELD, <http://www.usatf.org/About/Privacy---Other-Policies/Transgender-Transsexual.aspx> (last visited Jan. 5, 2016) [hereinafter TRACK & FIELD POLICY] (citing INT’L OLYMPIC COMM., STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (2003), http://www.olympic.com/Documents/Reports/EN/en_report_905.pdf).

on legal documents, and adhere to a two-year waiting period.⁹¹ USA Boxing⁹² and USA Gymnastics⁹³ have identical policies, although USA Gymnastics makes an exception for transgender athletes who have not yet reached the age of puberty.⁹⁴

II. Critique of Birth Certificate Policies

As discussed above, birth certificate policies effectively ban young transgender athletes from gender-consonant participation because those athletes typically cannot fulfill the requirements—which often include permanent and invasive genital reconstructive surgery—for changing their birth certificates.⁹⁵ This Part will argue that sport organizations should reject these policies because they are out of sync with the medical, ethical, and legal consensus about the significance of gender identity and the harm individuals experience when sports’ governing bodies disregard or suppress individuals’ gender identities.

A. *Birth Certificate Policies Conflict with Medical Consensus About Gender Identity and Cause Psychological Harm*

Gender identity, a person’s basic sense of being male or female, is something far from trivial, but is rather a deeply felt, core component of a person’s identity.⁹⁶ Medical experts assert that gender identity is a “fundamental part of being human”⁹⁷ and “the most important determinant of a person’s sex”—even more important than other sex-determinant factors such as chromosomes, hormones, genitalia, and secondary sex characteristics.⁹⁸ Gender identity is “innate”⁹⁹ and, it is believed,

91. *Id.* (citing INT’L OLYMPIC COMM., STATEMENT OF THE STOCKHOLM CONSENSUS ON SEX REASSIGNMENT IN SPORTS (2003), http://www.olympic.org/Documents/Reports/EN/en_report_905.pdf).

92. USA BOXING, MEDICAL HANDBOOK AND MEDICAL RULES OF AIBA OPEN BOXING 4 (2013) [hereinafter BOXING POLICY], http://media.wix.com/ugd/2bc3fc_097c27dfc6784e9eb89d7c5ab44dd399.pdf.

93. USA GYMNASTICS, USA GYMNASTICS POLICY FOR TRANSGENDER INCLUSION 3 (2015) [hereinafter GYMNASTICS POLICY], http://media.wix.com/ugd/2bc3fc_2a79ff51fb2f40a6ac0c1ad4a2493543.pdf.

94. *Id.*

95. *See supra* Part I.A.1.

96. BRILL & PEPPER, *supra* note 21, at 14.

97. Brief of World Professional Association for Transgender Health, Pediatric Endocrine Society, et al. as Amici Curiae Supporting Appellant, G.G. v. Gloucester Cty. Sch. Bd., No. 15-2056 (4th Cir. 2015), 2015 WL 6724594, at *12 [hereinafter Gloucester Brief].

98. Brief for Maine Chapter of the American Academy of Pediatrics, et al. as Amici Curiae Supporting Appellant, Doe v. Clenchy, 86 A.3d 600 (Me. 2013), 2013 WL 8349676, at *8 [hereinafter Clenchy Brief]; *see also* Norman P. Spack, An

reflects “a strong biological and genetic component.”¹⁰⁰ In all, the primacy and essential nature of gender identity means that a transgender girl is a girl, and a transgender boy is a boy.

Though people typically recognizes their gender identities at a young age, gender identity cannot be determined at birth. As such, a doctor does not consider gender identity when identifying an individual as “male” or “female” on a person’s birth certificate. When institutions assign people to sex-specific facilities or activities based on birth certificates, they do not limit opportunities for those whose gender identities and birth-assigned sexes align. But such classifications can and do cause “tremendous pain and harm” to transgender individuals.¹⁰¹ Birth-certificate based classifications often force transgender individuals to suppress or deny their gender identities and to experience the indignity of having their true selves disregarded.¹⁰² This can cause emotional distress,¹⁰³ which, for some, rises to the level of clinical significance in the form of a diagnosis called gender dysphoria.¹⁰⁴

In contrast, policies that permit gender-consonant participation are “critically important”¹⁰⁵ to transgender individuals for a host of reasons, including promoting emotional, psychological, physical, and academic benefits.¹⁰⁶ By supporting healthy identity-formation and fostering relationships among same-gender peers, institutional recognition of the centrality of an individual’s gender identity helps alleviate the distress that a transgender adolescent may experience.¹⁰⁷ Such actions are especially important in the scholastic context, as schools are “the primary social setting in which friends are made, social skills are

Endocrine Perspective on the Care of Transgender Adolescents, 13 J. GAY & LESBIAN MENTAL HEALTH 309, 312–13 (2009) (discussing the medical and mental health approaches to caring for transgender youths’ physical and emotional health).

99. Gloucester Brief, *supra* note 97, at *14.

100. Clenchy Brief, *supra* note 98, at *6.

101. Gloucester Brief, *supra* note 97, at *15.

102. Harper Jean Tobin & Jennifer Levi, *Securing Equal Access to Sex-Segregated Facilities for Transgender Students*, 28 WIS. J.L. GENDER & SOC’Y 301, 302 (2013).

103. *Id.* at 302, 306.

104. AM. PSYCHIATRIC ASS’N, GENDER DYSPHORIA 1 (2013), <http://www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf>.

105. Scott Skinner-Thompson & Ilona M. Turner, *Title IX’s Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC’Y 271, 296 (2013).

106. *Id.* at 298.

107. *Id.* at 299; *see also* Gloucester Brief, *supra* note 97, at *16–17 (noting that the “distress that transgender individuals may experience can be eased” through support and affirmation of the individual’s gender).

learned, and self-efficacy is developed.”¹⁰⁸ In the athletic context, gender-consonant policies promote participation by transgender students who would otherwise be deterred by rules that classify them in a manner at odds with their core identities. Athletic participation provides many positive benefits to youth in general, including psychological resiliency, feelings of connectedness, and positive self-image.¹⁰⁹ These benefits may be particularly valuable and relevant to transgender youth, who face an elevated risk of isolation, truancy, harassment, and suicide.¹¹⁰

In summary, birth-certificate based policies are painfully exclusionary for transgender youth. In contrast, policies that permit gender-consonant participation promote healthy identity formation and provide protection against the risks associated with distress. Schools and other organizations provide athletic opportunities to youth with the belief that sports are good for young persons’ physical, social, and emotional wellness. Birth certificate-based policies are antithetical to these goals.

B. Birth Certificate Policies Conflict with Title IX and Anti-Discrimination Laws in Many States

The only judicial decision to have considered the validity of a policy excluding transgender athletes from gender-consonant participation in athletics is *Richards v. U.S. Tennis Ass’n*.¹¹¹ The *Richards* court ruled that the U.S. Tennis Association (USTA) engaged in unlawful sex discrimination when it excluded a transgender woman, Renee Richards, from competing as a woman in the 1976 U.S. Open.¹¹² The court faulted the USTA for using Richards’s chromosomes as the basis for classifying her as “male,” disregarding the fact that she was “psychologically a woman.”¹¹³ While contemporary athletics programs no longer use chromosome tests to exclude transgender athletes, the application of birth-certificate policies to youth and scholastic sports are a similar means of exclusion, since transgender youth are as incapable of

108. Gloucester Brief, *supra* note 97, at *12 (“Simply put, schools are ‘a central component in virtually every adolescent’s life.’” (quoting Deana F. Morrow, *Social Work Practice with Gay, Lesbian, Bisexual, and Transgender Adolescents*, 85 FAMS. SOC’Y 91, 93 (2004))).

109. See Buzuvis, *supra* note 68, at 46–47.

110. See Sari L. Reisner et al., *Mental Health of Transgender Youth in Care at an Adolescent Urban Community Health Center: A Matched Retrospective Cohort Study*, 56 J. ADOLESCENT HEALTH 274 (2015) (finding that transgender youth are at greater risk for negative mental health outcomes than cisgender youth).

111. *Richards v. U.S. Tennis Ass’n*, 400 N.Y.S.2d 267 (Sup. Ct. N.Y. Cnty. 1977).

112. *Id.* at 272.

113. *Id.*

changing their birth certificates¹¹⁴ as Richards was of changing her chromosomes. As such, the *Richards* court’s admonishment of USTA’s policy should resonate with any court considering the legality of birth certificate policies under relevant sources of law—including Title IX and state antidiscrimination laws. Courts and regulators have interpreted Title IX as holding that birth certificate policies are prohibited sex discrimination. And, what is more, birth certificate policies that apply in interscholastic and youth sports conflict with the laws of several states that prohibit gender-identity discrimination in education and public accommodations.

1. Birth Certificate Policies Inflict Sex Discrimination Prohibited by Constitutional and Federal Civil Rights Law

With increasing frequency, courts and regulators understand that discrimination against transgender individuals is a form of sex discrimination that violates constitutional and statutory mandates for equal protection and equal access to educational opportunities based on sex. This Subpart will explain the basis for imposing these civil rights protections on athletic associations, their member institutions, and other non-scholastic youth sports programs. It will then present the arguments that are emerging about why the sources of legal protection against sex discrimination prohibit these bodies from restricting gender-consonant participation.

- i. *Scope of Equal Protection and Title IX*

The Equal Protection Clause of the Fourteenth Amendment prohibits government entities and other state actors from discriminating against citizens on the basis of sex, unless the state’s conduct serves “important governmental objectives and . . . the discriminatory means employed are substantially related to the achievement of those objectives.”¹¹⁵ School districts are government entities bound by the Equal Protection Clause, and the “pervasive entwinement” between state athletic associations and their public school members, as well as state-level education officials, means that school districts are also state actors subject to the Constitution’s requirements.¹¹⁶ Outside the

114. See *supra* Part I.A.1.

115. *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).

116. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303 (2001).

educational context, courts have found that youth sports programs are state actors because of their close relationships with municipal governments and because they use public facilities. Thus, the Constitution's prohibition on sex discrimination arguably applies to many youth sports programs as well.¹¹⁷

In addition to the U.S. Constitution, several federal civil rights laws protect citizens against discrimination based on sex. One such law, Title IX of the Education Amendments Act of 1972, prohibits sex discrimination by educational institutions—both public and private—that receive federal funds.¹¹⁸ In some circumstances, courts have found that Title IX covers interscholastic athletic associations themselves.¹¹⁹

117. *See, e.g.*, *Fortin v. Darlington Little League*, 514 F.2d 344, 351 (1st Cir. 1975) (holding that a little league baseball chapter, as a state actor, could not categorically exclude girls); *Hoover v. Meiklejohn*, 430 F. Supp. 164, 169–70 (D. Colo. 1977) (holding that a high school could not constitutionally exclude a girl from the boys' soccer team on the sole basis of gender); *Clinton v. Nagy*, 411 F. Supp. 1396, 1400 (N.D. Ohio 1974) (holding that the Equal Protection Clause requires a municipal football league to let a qualified girl play).

118. *See, e.g.*, *Valesky v. Aquinas Acad.*, Civ. No. 09-800, 2011 WL 4102584 (W.D. Pa. Sept. 14, 2011) (holding that Title IX applies to Catholic schools that participate in the national school lunch and e-rate technology subsidy programs, as well as to a non-participating school operated by the same diocese); *Russo v. Diocese of Greensburg*, Civ. No. 09-1169, 2010 WL 3656579 (W.D. Pa. Sept. 15, 2010) (finding that, by accepting any federal funds, Title IX applies to the entirety of a school's operations).

119. An athletic association that is an agent of the state education agency and which receives federal funds is subject to Title IX. *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 271–72 (6th Cir. 1994) (noting that dues payments to the association by federally funded member schools supports the application of Title IX); *see also* PA. POLICY, *supra* note 46, at 1 (“The resolution must state that, in all matters pertaining to interscholastic athletic activities, the school shall be governed by the Constitution and By-Laws of the PIAA.”). Additionally, an athletic association whose members receive federal funding may be subject to Title IX on the basis of the association's “controlling authority” over its members. *See Cmty. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 852 (W.D. Mich. 2001); *cf. Kemether v. Pa. Interscholastic Athletic Ass'n, Inc.*, 15 F. Supp. 2d 740, 767 (E.D. Pa. 1998) (holding that an association was subject to Title IX because of the association's requirement that federally funded member schools submit to the association's authority and pay dues). However, in the absence of the Supreme Court's endorsement, *see Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 469–70 (1999) (refusing to consider “controlling authority” arguments raised by the plaintiffs), the test is not universally applied. *See Parker v. Ind. High Sch. Athletic Ass'n*, No. 1:09-cv-885-WTL-JMS, 2009 WL 4806943 (S.D. Ind. Dec. 02, 2009) (rejecting the argument that an athletic association is subject to Title IX without considering the “controlling authority” test); *Johnny's Icehouse, Inc. v. Amateur Hockey Ass'n of Ill.*, 134 F. Supp. 2d 965, 970 (N.D. Ill. 2001) (same).

Yet even where an association is not directly subject to Title IX, a student-plaintiff may indirectly challenge an association's discriminatory policy by suing the student's own school, which is subject to Title IX, and naming competitor schools that are also subject to Title IX as co-defendants. *Parker v. Franklin Cty. Cmty. Sch. Corp.*, 667 F.3d 910, 924 (7th Cir. 2012). While the competitor schools would not be liable to the plaintiff for monetary damages, they would be bound by

*ii. Transgender Discrimination Is Sex
Discrimination*

Courts and regulators are increasingly recognizing that discrimination against transgender individuals is a form of sex discrimination under both the Constitution and Title IX. Courts commonly reach this conclusion by applying the principle that sex discrimination includes discrimination on the basis of gender stereotypes. The origin of this interpretation is the 1989 Supreme Court decision, *Price Waterhouse v. Hopkins*.¹²⁰ In *Price Waterhouse*, the Court endorsed the idea that, under Title VII, the federal employment discrimination statute, discrimination based on an individual’s failure to conform with gender stereotypes is a form of sex discrimination.¹²¹ Though *Price Waterhouse* did not involve a transgender plaintiff, lower courts have applied its rationale to protect transgender plaintiffs who are fired, harassed, or otherwise discriminated against for defying societal expectations that a person’s sex must always align with that person’s gender identity and expression.¹²² Moreover, they have recognized this protection not only as a matter of statutory law, but constitutional law as well.¹²³

Contemporary courts and regulators have expanded this gender-stereotype rationale to provide additional support for the conclusion that sex discrimination statutes protect transgender individuals. According to one district court, discrimination against a transgender employee amounts to sex discrimination when it targets the employee because of the employee’s gender transition.¹²⁴ In that case, the court compared the employer, which had revoked the plaintiff’s job offer after finding out she planned to transition to a female appearance, to an employer who discriminates against someone because they converted to a

any injunctive relief awarded to the plaintiff, who would otherwise be “left without an effective remedy.” *Id.*

120. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

121. *Id.* at 250–51 (citing 42 U.S.C. §§ 2000e–2000e-17). Courts regularly apply Title VII decisions that interpret sex discrimination to cases applying Title IX. *See Johnson v. Baptist Med. Ctr.*, 97 F.3d 1070, 1072 (8th Cir. 1996).

122. *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 574–75 (6th Cir. 2004) (drawing a parallel between an employer “who discriminates against women because, for instance, they do not wear dresses or makeup” and employers “who discriminate against men because they do wear dresses or makeup, or otherwise act femininely”).

123. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination against a transgender plaintiff is sex discrimination for purposes of applying heightened scrutiny under the Equal Protection Clause, and noting that “[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes”).

124. *Schroer v. Billington*, 577 F. Supp. 2d 293, 294 (D.C. Cir. 2008).

different religion.¹²⁵ Just as the latter would clearly constitute religious discrimination because the employer is considering religion when singling out the plaintiff, so too is the former sex discrimination.¹²⁶

Recently, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing Title VII, has applied a definition of sex discrimination that categorically includes discrimination against transgender employees.¹²⁷ This interpretation is even broader than existing judicial interpretations because it covers discrimination based directly on a plaintiff's transgender status, rather than limiting that protection to cases where the plaintiff can prove that discrimination was specifically motivated by nonconformity with stereotypes or by the fact of their transition.¹²⁸ The foundation for this interpretation is particular language in *Price Waterhouse* which rejects a narrow reading of sex discrimination as confined to one's "biological" or birth-assigned sex.¹²⁹ The *Price Waterhouse* Court read "sex" to include "gender," and prohibited employers from "tak[ing] gender into account in making an employment decision."¹³⁰ By definition, transgender individuals are people whose internal understandings of their own genders do not correspond to their birth-assigned sexes.¹³¹ Thus, to single out a transgender person for not comporting with gender stereotypes is necessarily to target that person because that person's gender and sex are not aligned; in other words, it "take[s] gender into

account."¹³² As such, discrimination against someone because that person is transgender is, necessarily, sex discrimination.¹³³

125. *Id.* at 306–07.

126. *Id.*

127. Macy v. Holder, EEOC Appeal No. 0120120821 (Apr. 20, 2012), <https://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

128. *See id.*

129. *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989)).

130. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989).

131. *Understanding Gender*, *supra* note 17.

132. Macy, EEOC Appeal No. 0120120821 (quoting *Price Waterhouse*, 490 U.S. at 242).

133. *Id.* The Commission stated:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the

iii. *Application to Athletics Policies*

To date, no judicial cases or administrative decisions have considered whether a policy that excludes transgender athletes from gender-consonant participation, such as a birth certificate policy, constitutes sex discrimination under any of the theories described above. However, the above interpretations are readily available for courts and regulators to use to support the conclusion that such policies violate Title IX and/or the Equal Protection Clause.

Birth certificate policies clearly constitute sex discrimination—which, by definition, includes discrimination on the basis of transgender status *per se*—because they exclude transgender girls from girls’ sports and transgender boys from boys’ sports because of their transgender status. In 2015, the EEOC reached a similar conclusion in a case about a transgender employee’s gender-consonant access to sex-specific restrooms.¹³⁴ In that case, the EEOC specifically rejected the employer’s arguments that the employee could be excluded because she had not yet undergone a surgical transition.¹³⁵

The Department of Education (DOE) similarly believes that sex discrimination statutes like Title IX prohibit the exclusion of transgender students from sex-specific facilities consonant with their gender identities.¹³⁶ In November 2015, the agency found that a school district had violated Title IX by excluding a transgender girl from the girls’ locker room.¹³⁷ The DOE’s

process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition [from *Price Waterhouse*] that “an employer may not take gender into account in making an employment decision.”

Id. (emphasis added) (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000); *Price Waterhouse*, 490 U.S. at 244); see also *Rumble v. Fairview Heath Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015) (“Because the term ‘transgender’ describes people whose genderexpression differs from their assigned sex at birth, discrimination based on an individual’s transgender status constitutes discrimination based on gender stereotyping.”).

134. *Lusardi v. McHugh*, EEOC Appeal No. 0120133395 (Apr. 1, 2015), www.eeoc.gov/decisions/0120133395.txt.

135. *Id.* The Commission also rejected the employer’s arguments that the complainant had at one point agreed not to use the women’s restroom and that supervisors and co-workers would be uncomfortable with her presence in the women’s restroom. *Id.*

136. Letter from Adele Rapport, Reg’l Dir., Dep’t of Ed. Office for Civil Rights, to Daniel Cates, OCR Case No. 05-14-1055 (Nov. 2, 2015) [hereinafter Letter from Adele Rapport], <http://www2.ed.gov/documents/press-releases/township-high-211-letter.pdf>.

137. *Id.*

settlement agreements with other school districts further reflect its position on gender-consonant access to facilities.¹³⁸

As these administrative examples demonstrate, sex discrimination occurs when a decision-maker fails to treat a transgender person according to that person's affirmed gender in the particular context of sex-segregated facilities. What is more, these conclusions foreshadow the invalidity of birth certificate policies. Since birth certificate policies affect a similar exclusion of transgender youth and adolescents from gender-consonant participation in sex-segregated athletics, courts and administrative agencies could use similar lines of reasoning to invalidate them.

The gender-stereotyping interpretation of sex discrimination also suggests that birth certificate policies are invalid in interscholastic and youth sports. To date, courts applying the gender-stereotyping theory have mostly addressed stereotypes relating to appearance and mannerisms.¹³⁹ For example, the Sixth Circuit found that Title VII's ban on sex discrimination applied to discrimination against a transgender woman whose physical appearance and outward behavior were inconsistent with stereotypes associated with the male sex she was assigned at birth.¹⁴⁰ Admittedly, this particular stereotype theory would not assist a transgender girl challenging a birth certificate policy—she would not be excluded from girls' sports for failing to conform to male stereotypes. However, a gender stereotype does arguably motivate the exclusion of transgender individuals from gender-consonant participation: the stereotype that all people who identify as girls were assigned a female sex at birth—in other words, that “girls” does not include transgender girls. While this particular stereotype has not yet been expressly recognized by

138. Resolution Agreement, Downey Unified Sch. Dist., OCR Case No. 09-12-1095 (Oct. 8, 2014), <http://www2.ed.gov/documents/press-releases/downey-school-district-agreement.pdf>; Resolution Agreement Between the Arcadia Unified Sch. Dist., the U.S. Dep't of Educ., Office for Civil Rights, and the U.S. Dep't of Justice, Civil Rights Div., OCR Case No. 09-12-1020, at 2 (July 24, 2013), <http://www.justice.gov/sites/default/files/crt/legacy/2013/07/26/arcadiaagree.pdf>.

139. See, e.g., *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.C. Cir. 2008) (finding compelling evidence that an employer's hiring decision was “infected by sex stereotypes” because the decision-maker admitted that when she “viewed the photographs of [plaintiff] in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in woman's clothing”); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (holding that the plaintiff sufficiently pleaded claims of sex stereotyping and gender discrimination by alleging “that [plaintiff's] failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind [the employer's] actions”).

140. *Smith*, 378 F.3d at 574.

courts,¹⁴¹ there is no reason why a court could not consider the stereotype of birth sex/gender-identity consistency to be prohibited grounds for excluding a transgender athlete from gender-consonant participation. Therefore, under both statutory and constitutional protections against discrimination on the basis of sex, courts and regulators could readily conclude that birth certificate policies are invalid.

2. Birth Certificate Policies Conflict with State Laws That Prohibit Discrimination on the Basis of Gender Identity

Thirteen states and the District of Columbia have laws that prohibit public primary and secondary educational institutions from discriminating against students on the basis of gender identity.¹⁴² These statutes provide even clearer sources of

141. In *Kastl v. Maricopa County Community College District*, the Ninth Circuit Court of Appeals held, based on a reading of Title IX that incorporated *Price Waterhouse*, that a transgender female instructor who had sued for the right to use the women's restroom during her transition had established a prima facie of sex discrimination. *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009). The court appeared intuitively to accept *Kastl* as a gender nonconforming woman, in the sense that her anatomy, chromosomes, and birth-sex assignment defy stereotypes about the anatomy, chromosomes, and birth-sex assignment women typically have. Unfortunately, the court also mistakenly applied the *McDonnell-Douglas* framework, *see id.* at 493–94 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)), which is only applicable in cases involving circumstantial evidence of sex discrimination. *See Vasquez v. Cnty. of Los Angeles*, 349 F.3d 634, 640 (9th Cir. 2004). This mistake invited unnecessary consideration of the college's purported nondiscriminatory rationale and caused the court to affirm the lower court's dismissal of the instructor's case. *Id.* at 494. Still, the court notably applied *Price Waterhouse* to conclude that sex discrimination under Title IX includes treating a transgender woman differently from other women because of the male sex she was assigned at birth. *Id.*; *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007) (sidestepping the question of whether *Price Waterhouse* supports a finding of a prima facie case of sex discrimination in a transgender woman's suit against her employer for excluding her from the women's bathroom). *But see Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 681 (W.D. Pa. 2015) (rejecting a transgender male plaintiff's attempt to use *Price Waterhouse* to support his right to use male restrooms and locker rooms on campus); *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, Civ. No. 4:15-cv-54, 2015 WL 5560190, at *8 (E.D. Va. Sept. 17, 2015) (same).

142. CAL. EDUC. CODE § 220 (West 2012); COLO. REV. STAT. ANN. § 22-32-109(1)(II)(I) (West 2012); CONN. GEN. STAT. ANN. § 10-15c (West 2011); D.C. CODE § 2-1402.41 (2001); 775 ILL. COMP. STAT. 5/1-102, 5/1-103 (West 2015); IOWA CODE ANN. § 216.9 (West 2008); ME. REV. STAT. tit. 5, § 4591 (2012); MASS. GEN. LAWS ANN. ch. 76, § 5 (West 2012); MINN. STAT. ANN. §§ 363A.03, 363A.13 (West 2015); NEV. REV. STAT. ANN. § 233.010 (West 2011); N.J. STAT. ANN. § 10:5-12 (West 2008); VT. STAT. ANN. tit. 9, § 4502 (2009); WASH. REV. CODE ANN. § 49.60.030 (West 2009); OR. ADMIN. R. 581-021-0045 (2008). Nevada's law does not cover educational institutions directly, but the state agency that enforces the statute has

protection for transgender students than constitutional and statutory protections because they eliminate the need for courts and regulators to make the inferential leap from sex discrimination to transgender discrimination. Not surprisingly, therefore, courts have interpreted gender-identity statutes to prohibit schools from excluding transgender students from gender-consonant facilities such as restrooms,¹⁴³ and regulators have interpreted them to permit gender-consonant athletic participation as a matter of public law.¹⁴⁴ To be sure, none of the states with gender identity enumerated in their education nondiscrimination statutes are the states whose athletic associations restrict transgender students' participation to the sex designated on their birth certificates.¹⁴⁵ However, if a birth certificate policy ever did take hold in one of these states through an amendment to state law or a revision of an athletic association's policy, the policy would likely not withstand challenge under anti-discrimination laws.

Non-scholastic youth sports programs are not governed by Title IX or any of the other education-specific state laws discussed so far in this Article. However, seventeen states and the District of Columbia have laws that prohibit places of public accommodation from discriminating against members of the public on the basis of gender identity,¹⁴⁶ and public accommodations laws

suggested that educational institutions are included as places of public accommodations, which are covered under the law. *See Public Accommodations*, NEV. EQUAL RIGHTS COMM'N, http://detr.state.nv.us/Nerc_pages/public_accommodation_discrimination.htm (last visited Mar. 11, 2016). Though not a statute or legislative rule, the Rhode Island Department of Education has a non-legislative policy that prohibits excluding students from educational and extracurricular activities on the basis of gender identity. R.I. DEPT OF EDUC., BOARD OF REGENTS POLICY STATEMENT ON DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY/EXPRESSION (2010).

143. *Doe v. Reg'l Sch.* Unit 26, 86 A.3d 600, 603 (Me. 2014).

144. CONN. SAFE SCH. COAL., GUIDELINES FOR CONNECTICUT SCHOOLS TO COMPLY WITH GENDER IDENTITY AND EXPRESSION NON-DISCRIMINATION LAWS: FREQUENTLY ASKED QUESTIONS 3–4 (2012), http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf; MASS. DEPT OF ELEMENTARY & SECONDARY EDUC., GUIDANCE FOR MASSACHUSETTS PUBLIC SCHOOLS, CREATING A SAFE AND SUPPORTIVE SCHOOL ENVIRONMENT: NONDISCRIMINATION ON THE BASIS OF GENDER IDENTITY 2–3 (2016), <http://www.doe.mass.edu/ssce/GenderIdentity.pdf>.

145. *See supra* Part I.A.1.

146. CAL. CIV. CODE § 51 (West 2007); COLO. REV. STAT. §§ 24-34-301, 24-34-601 (2015); CONN. GEN. STAT. §§ 46a-64, 81d (2015); DEL. CODE ANN. tit. 6, § 4504 (2013); D.C. CODE § 2-1401.02 (2012); HAW. REV. STAT. § 489-3 (2008); 775 ILL. COMP. STAT. 5/1-102, 103 (2011); IOWA CODE § 216.2 (2009); ME. STAT. tit. 5, § 4553 (2013); MD. CODE ANN., STATE GOV'T § 20-301 (West 2014); MINN. STAT. § 363A.03 (2015); NEV. REV. STAT. § 651.050 (2014); N.J. STAT. ANN. § 10:5-5 (1992); N.M. STAT. ANN. § 28-1-2 (West 2011); OR. REV. STAT. §§ 659A.400, 174.100 (2013); R.I. GEN. LAWS § 11-24-3 (2002); VT. STAT. ANN. tit. 9, § 4501 (2006); WASH. REV. CODE

cover youth sports programs in many cases.¹⁴⁷ While no NGBs have expressly adopted a birth certificate policy for youth sports, only a few, such as USA Soccer, have expressly prohibited local organizations from limiting transgender athletes’ opportunities according to their birth certificates.¹⁴⁸ In the absence of an NGB policy requiring local youth sport programs to permit gender-consonant participation, these programs risk violating state antidiscrimination laws by limiting transgender athletes’ participation to the sex on their birth certificates.

C. Conclusion

Birth certificate policies are endorsed by scholastic athletic associations in several states and may permissibly operate by default in youth sports programs whose NGBs have failed to adopt policies to the contrary. Such policies effect an absolute exclusion on transgender athletes’ gender-consonant participation, undermining their ability to live “as who they really are” and contributing to their psychological distress. Moreover, while no existing case law evaluates birth certificate policies under Title IX and state antidiscrimination laws, sex-discrimination laws are increasingly protective of transgender individuals in other contexts, including those that, like athletics, are segregated by sex.¹⁴⁹ Therefore, not only are birth certificate policies out of step with prevailing medical and ethical standards, but they likely violate the law as well.

§ 49.60.040 (2008).

147. *E.g.*, *Nathanson v. Spring Lake Park Panther Youth Football Ass’n*, No. CIV. 151-510 ADM/BRT, 2015 WL 5286770, at *5 (D. Minn. Sept. 10, 2015) (holding that a youth football association is a place of public accommodation under Minnesota’s public accommodations law); *Apilado v. N. Am. Gay Amateur Athletic All.*, 792 F. Supp. 2d 1151, 1158 (W.D. Wash. 2011) (holding that a gay softball tournament was a place of public accommodation under Washington’s public accommodations law); *see also* *Matthews v. NCAA*, 179 F. Supp. 2d 1209, 1223 (E.D. Wash. 2001) (finding that the NCAA is a public accommodation for purposes of the Americans with Disabilities Act (ADA)); *Shultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222, 1225 (C.D. Cal. 1996) (holding that a youth baseball league is a place of public accommodation under the ADA); *United States v. Slidell Youth Football Ass’n*, 387 F. Supp. 474, 483 (E.D. La. 1974) (holding that a youth football league was a place of public accommodation under a federal civil rights law).

148. U.S. SOCCER FED’N, *supra* note 84, at 2.

149. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (correctional facilities); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (public employment).

III. Critique of Hormone Policies and Other Gender-Consonant Policies That Contain Limitations and Restrictions

As explained above, gender identity is the central determining factor of one's gender classification; a transgender girl is a girl irrespective of her physical characteristics. For this reason, athletic organizations—particularly those serving children and adolescents—should validate the gender identities of all transgender participants, not just those who are able and ready to undergo drastic medical interventions, such as genital reconstructive surgery¹⁵⁰ or treatment with cross-sex hormones.¹⁵¹ After providing some background on the various medical interventions that such policies may require, this Subpart will explain how hormone policies have the potential to harm transgender athletes. It will also negate arguments that such policies are necessary to provide safe and fair athletic opportunities for non-transgender girls. Finally, it will argue that hormone policies, as well as other policies that permit exclusions based on physical characteristics, are inconsistent with Title IX and many states' antidiscrimination laws.

A. *Understanding Transition Options Available to Transgender Adolescents*

Children and adolescents who express gender dysphoria are increasingly receiving support from parents and other caregivers to undergo a transition process.¹⁵² Yet, the aspects of a person's transition, including the timeline, are diverse and highly individualized. Depending on the individual's age, needs, resources, and environment, such a transition may be purely social, or it may include medical interventions in the form of hormone treatment.¹⁵³ Surgical interventions, which transgender adults commonly undertake, are generally not available to transgender children and adolescents.¹⁵⁴

A "social transition" is the process of coming out as

150. For examples of such policies, see TRACK & FIELD POLICY, *supra* note 90; BOXING POLICY, *supra* note 92; GYMNASTICS POLICY, *supra* note 93.

151. IDAHO POLICY, *supra* note 37, at 87; MO. POLICY, *supra* note 38, at 136; OKLA. POLICY, *supra* note 39, at 82–83; OR. POLICY, *supra* note 40, at 98; WIS. POLICY, *supra* note 41, at 2.

152. See, e.g., Kelly Wallace, *When Your Young Daughter Says 'I'm a Boy,'* CNN (June 2, 2015, 11:10 AM), <http://www.cnn.com/2015/03/18/living/feat-transgender-child-raising-ryland/> (discussing one family's support of their transgender son).

153. See WPATH, *supra* note 32, at 2.

154. See *id.* at 16.

transgender to one’s family, friends, and community.¹⁵⁵ Transgender people may request to be referred to by gender-affirming names and pronouns and to be allowed to express their gender identities through their clothing, hair, and other aspects of their outward appearance.¹⁵⁶ For transgender children who have not yet undergone puberty, a social transition is often sufficient to alleviate gender dysphoria.¹⁵⁷ Moreover, while a child’s gender dysphoria may persist into adulthood, such an outcome is not inevitable, and some studies have found that most gender-variant children do not grow into transgender adults.¹⁵⁸ For this reason, prevailing standards delay medical interventions that are irreversible or that could cause difficulty for an individual whose gender dysphoria desists after childhood.¹⁵⁹

Puberty causes an adolescent’s body to develop secondary sex characteristics like breasts, menarche, voice change, or facial hair.¹⁶⁰ For a transgender adolescent, it may be distressing to undergo such physical changes that are at odds with that individual’s gender identity and gender expression. For this reason, many transgender adolescents, with the support of their parents and medical caregivers, opt to use hormones to delay the onset of puberty.¹⁶¹ Such a delay provides the advantage of avoiding distressful puberty while allowing the child to reach adolescence before making decisions about undergoing treatment with cross-sex hormones, which would feminize or masculinize their bodies consistent with their gender identity.¹⁶² This time is valuable because unlike gender dysphoria in children, gender dysphoria that manifests in adolescents rarely desists.¹⁶³

There is little consensus about the appropriate age to

155. *See id.* at 17.

156. *See id.*

157. *See id.* at 10.

158. *Id.* at 11 (citing “follow-up studies of prepubertal children (mainly boys) who were referred to clinics for assessment of gender dysphoria” that found “the dysphoria persisted into adulthood for only 6–23% of children”); *see also* Jack Drescher & Jack Pula, *Ethical Issues Raised by the Treatment of Gender-Variant Prepubescent Children*, 44 HASTINGS CTR. REP. S17, S17 (2014) (“[G]ender dysphoria in childhood does not inevitably continue into adulthood, and only 6 to 23 percent of boys and 12 to 27 percent of girls treated in gender clinics showed persistence of their gender dysphoria into adulthood.”).

159. WPATH, *supra* note 32, at 17.

160. *See id.* at 18–20.

161. *See id.* at 18–19.

162. *Id.* at 18.

163. *Id.* at 11.

prescribe cross-sex hormones for transgender adolescents. While the Endocrine Society instructs providers to wait until their patients reach age sixteen, it is becoming increasingly common for providers to prescribe cross-sex hormones to their patients as young as age thirteen or fourteen.¹⁶⁴ The decision if and when to start cross-sex hormones is personal and individualized, taking into account the individual's emotional readiness, family support, access to health care, and financial resources.¹⁶⁵

If a transgender adolescent chooses to receive treatment with cross-sex hormones, that person's body will undergo changes similar to puberty for the individual's affirmed gender.¹⁶⁶ For transgender individuals who identify as male, exogenous testosterone allows the body to develop masculine characteristics, such as a deepening voice and the development of body and facial hair.¹⁶⁷ Testosterone also increases musculature and decreases fat content.¹⁶⁸ For transgender individuals who identify as female, feminizing treatments typically combine anti-androgen agents, which suppress the body's production or ability to use testosterone, with estrogen, which aids in fat redistribution, breast development, and softening of the skin.¹⁶⁹

Risks and sacrifices also accompany cross-sex hormones. Cross-sex hormone treatments produce an increased risk of hypertriglyceridemia in transgender women, while transgender men and women alike face at least the possibility of an increased risk of cardiovascular disease, hypertension, and diabetes, among

164. Priyanka Boghani, *When Transgender Kids Transition, Medical Risks Are Both Known and Unknown*, FRONTLINE (June 30, 2015), <http://www.pbs.org/wgbh/frontline/article/when-transgender-kids-transition-medical-risks-are-both-known-and-unknown/>; Angus Chen, *Health Effects of Transitioning in Teen Years Remain Unknown*, NPR: SHOTS (July 22, 2015, 11:18 AM), <http://www.npr.org/sections/health-shots/2015/07/22/424996915/health-effects-of-transitioning-in-teen-years-remain-unknown>.

165. See WPATH, *supra* note 32, at 20.

166. See *id.* at 18.

167. WPATH, *supra* note 32, at 37 tbl.1A; *Hormone Administration*, CTR. EXCELLENCE FOR TRANSGENDER HEALTH, U.C.S.F., <http://transhealth.ucsf.edu/trans?page=protocol-hormones> (last visited Jan. 6, 2016) [hereinafter *Hormone Administration*].

168. Michaela C. Devries, *Do Transitioned Athletes Compete at an Advantage or Disadvantage as Compared with Physically Born Men and Women: A Review of the Scientific Literature*, CANADIAN ASS'N FOR ADVANCEMENT WOMEN & SPORT & PHYSICAL ACTIVITY 12 (2008), http://www.caaws.ca/e/wp-content/uploads/2013/02/Devries_lit_review2.pdf (noting that testosterone treatment increases muscle cross-sectional area and decreases subcutaneous fat in transgender men, though average muscle cross-section area is higher and subcutaneous fat is lower in non-transgender men).

169. WPATH, *supra* note 32, at 38 tbl.1B; *Hormone Administration*, *supra* note 167.

other conditions.¹⁷⁰ Hormone treatments also impair or reduce fertility on a potentially permanent basis.¹⁷¹ Moreover, because such treatment is relatively new, many fear that the treatment creates risks yet to be discovered.¹⁷²

As noted above, surgical interventions are not included in the standard of care for transgender youth, except in rare cases.¹⁷³ As a result, most transgender individuals are over the age of eighteen before they may feasibly consider surgical options, such as the removal of the phallus and testes for transgender women or mastectomies for transgender men who experienced female puberty.¹⁷⁴ Because these interventions have no bearing on a

person’s athletic ability, it has been persuasively argued that they should not be included in policies governing adult participation in athletics—let alone in youth participation.¹⁷⁵

B. Hormone Policies Harm Transgender Athletes

For many transgender individuals, the hormone treatments described above are highly desired and even medically necessary because they relieve the dissonance transgender people would otherwise experience as a result of living in a body discordant with their internal sense of gender. Yet for many reasons, it is exclusionary and potentially harmful to condition an adolescent transgender athlete’s gender-consonant participation on that person’s willingness to undertake such a significant step. As noted above, several athletic associations exclude transgender girls from participating in girls’ sports unless they have been on cross-sex hormones to suppress and counteract the effects of testosterone for at least one year.¹⁷⁶ This puts some transgender girls at risk of

170. WPATH, *supra* note 32, at 39–40.

171. *Id.* at 100–03.

172. *See id.* at 99–103.

173. *Id.* at 21 (“Genital surgery should not be carried out until (i) patients reach the legal age of majority to give consent for medical procedures in a given country, and (ii) patients have lived continuously for at least 12 months in the gender role that is congruent with their gender identity [except that c]hest surgery in [female-to-male] patients could be carried out earlier, preferably after ample time of living in the desired gender role and after one year of testosterone treatment.”).

174. *See id.* at 21; PAT GRIFFIN & HELEN J. CARROLL, ON THE TEAM: EQUAL OPPORTUNITY FOR TRANSGENDER STUDENT ATHLETES 12–14 (2010) [hereinafter GRIFFIN & CARROLL, ON THE TEAM], <http://www.nclrights.org/wp-content/uploads/2013/07/TransgenderStudentAthleteReport.pdf>.

175. GRIFFIN & CARROLL, ON THE TEAM, *supra* note 174, at 12.

176. *See* IDAHO POLICY, *supra* note 37, at 87; MO. POLICY, *supra* note 38, at 136;

temporary exclusion from gender-consonant participation in athletics while they satisfy the waiting period requirement. But for others, the requirement operates as a permanent exclusion, because such treatment may be unavailable for financial reasons or due to the difficulty of finding health-care providers who can capably address the medical needs of transgender youth.¹⁷⁷ It also excludes those who understandably wish to delay until adulthood a decision that is accompanied by a potentially permanent sacrifice of one's reproductive capabilities.

For transgender boys, a hormone policy does not impose a barrier to gender-consonant participation, but instead excludes them immediately from continuing in girls' sports.¹⁷⁸ And while many transgender boys will likely prefer the gender-validating opportunity to participate in boys' sports, others may prefer to continue to participate in girls' sports, despite identifying as male, for reasons that could be accommodated by a more flexible policy. For example, prior to transition, a transgender boy may have had his opportunities limited to girls' sports, which may be different from—and sometimes inferior to—the opportunities made available to boys, such as how girls are channeled into softball rather than baseball.¹⁷⁹ Under these circumstances, a transgender boy who was treated as a girl growing up may not have developed the skills or ability to qualify for the baseball team. Thus, for a transgender boy in this position, it may not be possible to simply switch to baseball, and he may be without a team in either sport. In addition, girls are not only steered away from particular sports, they also receive fewer athletic opportunities in general and less encouragement to develop athletic talent.¹⁸⁰ These factors

OKLA. POLICY, *supra* note 39, at 82–83; OR. POLICY, *supra* note 40, at 98; WIS. POLICY, *supra* note 41, at 2.

177. See Johanna Olson as told to Chris Gardner, *Why There's a Medical Crisis for Transgender Youth*, HOLLYWOOD REP. (Aug. 27, 2015, 9:00 AM), <http://www.hollywoodreporter.com/news/why-a-medical-crisis-transgender-818043> (discussing the dearth of facilities that provide “trans-related [health]services,” and stating that “[u]nless a family can get to one of the few existing [health care] centers [that provide trans-related services], there's practically nothing in the way of services available”).

178. See IDAHO POLICY, *supra* note 37, at 87; MO. POLICY, *supra* note 38, at 136; OKLA. POLICY, *supra* note 39, at 82–83; OR. POLICY, *supra* note 40, at 98; WIS. POLICY, *supra* note 41, at 2.

179. See JENNIFER RING, *STOLEN BASES: WHY AMERICAN GIRLS DON'T PLAY BASEBALL* (2009) (exploring the history of girls' participation in baseball and the social forces which have excluded and continue to exclude girls from playing the sport).

180. DON SABO & PHIL VELIZ, WOMEN'S SPORTS FOUND., *GO OUT AND PLAY: YOUTH SPORTS IN AMERICA* 70–71 (2008), <http://files.eric.ed.gov/fulltext/ED539976.pdf> (discussing the concept of a “hidden curriculum” in physical education [which] emphasizes competition and the highest level of physical skills

contribute to the generalized differences in athleticism between boys and girls,¹⁸¹ especially for the aspects of athleticism which research suggests are learned skills, not innate talents, such as motor skills, coordination, and form.¹⁸² For these additional reasons, a transgender boy—even one who is transitioning—may prefer what could be more skill-appropriate competition among girls. This may be especially true in the early days of treatment when his body would be still more physically similar to his other female teammates than to the bodies of the boys with whom he would then be expected to compete. As his body changes he may soon feel ready to join a boys’ team. A policy that does not automatically exclude transgender boys from girls’ sports provides the flexibility needed to enable the athlete and his support system to choose when that time should be, reducing the risk that, by pursuing a hormone-based transition, he may be excluded from athletics altogether.

For both male and female transgender athletes, participation policies based on hormone usage unnecessarily complicate what is already a complex and challenging decision about whether and when to undergo hormone treatment. Even without factoring in the effect of this decision on their athletic opportunities, transgender adolescents face the challenging task of balancing their immediate psychological and emotional needs for gender-affirming treatment with the more distant and remote risk of impaired health and fertility. Adding athletic participation to the list of factors puts undue pressure on transgender girls to begin treatment and accept those risks, and puts undue pressure on transgender boys to delay treatment and forego its benefits.¹⁸³

rather than promoting health and physical activity for its own sake,” and arguing that this focus has “often given boys an advantage because of their larger size and greater level of experience learning sports”); *see also* Buzuvis, *supra* note 68, at 38 (“When it comes to sport, men and boys have enjoyed centuries of preferential treatment, including encouragement, validation, opportunity, and incentive, not to mention the tailoring of sport to suit men’s physical and socially-constructed characteristics.”).

181. Buzuvis, *supra* note 68, at 37–38.

182. COLLETTE DOWLING, *THE FRAILTY MYTH: REDEFINING THE PHYSICAL POTENTIAL OF WOMEN AND GIRLS* 62 (2001). For example, according to one study, second-grade boys and girls threw at the same speed with their non-dominant arms, suggesting that practice, rather than innate biological traits, produced boys’ superior speed in dominant-arm throws. *Id.* at 65 (citing Kathleen Williams et al., *Environmental Versus Biological Influences on Gender Differences in Overarm Throw for Force: Dominant and Nondominant Arm Throws*, *WOMEN IN SPORT & PHYSICAL ACTIVITY J.*, Fall 1996, at 29, 42).

183. *See* Shawn Crincoli, *NCAA Transgender Student-Athlete Policy: Analysis*, *WORLD SPORTS L. REP.*, Nov. 2011, at 9, 11, <http://digitalcommons.tourolaw.edu/cgi/viewcontent.cgi?article=1467&context=scholarlyworks> (criticizing “the [NCAAs] adoption of a hormone-based approach for eligibility of university-aged trans

*C. Hormone Policies and Other Policies That Permit
Exclusion Are Not Necessary to Preserve the Athletic
Experience of Non-Transgender Participants*

Like hormone policies, which risk excluding transgender athletes who are not planning to or who are not ready for a hormone-assisted transition, policies that permit excluding transgender athletes on the basis of perceived “gender related advantages” operate to permit some, but not all, gender-consonant participation. Yet, while some believe that hormone policies and policies with caveats for gender-related advantages are necessary to ensure the safety and fairness of girls’ sports,¹⁸⁴ these objectives

are illusory in sport and cannot be attained by regulating the testosterone levels or other physical characteristics of transgender participants.¹⁸⁵

While athletic opportunities tend to be segregated by sex, within those categories, society tolerates a diverse range of body types and athletic talent.¹⁸⁶ By virtue of being inclusive, sports are never played on a level field. No state athletic associations exclude, for example, non-transgender girls who are of an above-average height, even though height is believed to contribute an athletic advantage in many sports. Nor do they typically prohibit freshmen, who may be as young as fourteen, from competing with and against seniors, even though a four-year age difference may create competitive advantages resulting from physical maturity and increased experience. Even the most elite athletic contests, let alone those in high school and youth sports, feel no need to screen and sort athletes according to whether or not they possess genes that clearly enhance traits like endurance and blood oxygen.¹⁸⁷ High school athletes who received athletic training early in life, who compete in their sport year-round instead of

women, without regard for the incentives this may create for young athletes to rush to begin cross-sex hormone treatment to participate in sport (with serious consequences, including though not limited to—infertility”).

184. See e.g., Reist, *supra* note 42 (reporting that “[t]he Nebraska School Activities Association’s proposed policy on transgender students’ participation in high school sports would require at least a year of hormone therapy for students transitioning from male to female . . . because of concerns about the competitive advantage a transgender female athlete might have over biologically female opponents,” and noting that opponents of the policy expressed concern that “any transgender policy . . . would be confusing to children and cause safety concerns because of the size differences between boys and girls”).

185. Devries, *supra* note 168, at 14.

186. Skinner-Thompson & Turner, *supra* note 106 at 274, 287.

187. Jon Bardin, *Is Gene Doping Coming to the Olympics?*, L.A. TIMES (July 18, 2012), <http://articles.latimes.com/2012/jul/18/science/la-sci-sn-is-gene-doping-coming-to-the-olympics-20120718>.

seasonally, and who have access to resources like private coaching, have clear competitive advantages, and these factors are not a proposed basis for excluding athletes for the sake of a level playing field. Thus, whatever physical or athletic advantage an un-transitioned transgender girl or a transitioning transgender boy may have—“may” being the appropriate word, since plenty of overlap exists between male and female categories when it comes to size, strength, and other facets of athleticism¹⁸⁸—it is just one manner of advantage among countless others.

In addition to tolerating diversity within sex categories, sport organizers sometimes even allow girls and boys to compete with and against each other, adding the diversity of gender to the mix. For example, some states permit or require schools to allow non-transgender boys to play on girls’ teams, when the boy would not otherwise have an opportunity to compete in that sport.¹⁸⁹ In field hockey, for example, athletic associations and conferences sometimes permit boys to play on girls’ teams because schools generally do not offer separate field hockey teams for boys.¹⁹⁰ In light of such policies, allowing a transgender girl to participate presents an even more compelling case for inclusion because she is female in the way that matters most: her gender identity. If girls’ sports can accommodate a non-transgender boy in the interest of ensuring that he has adequate access to athletic opportunities, a transgender girl can receive such accommodation as well.

Excluding an un-transitioned transgender girl or a transitioning transgender boy from a girls’ sport because of

188. Skinner-Thompson & Turner, *supra* note 106 at 274, 287; see also Shalender Bashin et al., *Proof of the Effect of Testosterone on Skeletal Muscle*, 170 J. ENDOCRINOLOGY 27, 27, 34 (2001), <http://joe.endocrinology-journals.org/content/170/1/27.full.pdf> (“There is agreement that testosterone supplementation increases muscle mass and maximal voluntary strength in a variety of clinical and experimental paradigms, but we do not know whether testosterone improves athletic performance or health-related outcomes . . . It is fair to state that unequivocal improvements [resulting from testosterone] in measures of athletic performance have not been demonstrated in any study.”) (citations omitted)).

189. See, e.g., *Att’y Gen. v. Mass. Interscholastic Athletic Ass’n*, 393 N.E.2d 284, 289 (Mass. 1979) (requiring the Massachusetts Interscholastic Athletic Association to permit boys on girls’ teams when there is not a boys’ team in that sport).

190. *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 173 (3d Cir. 1993) (permitting a boy’s participation on a girls’ field hockey team pending a finding by the district court that field hockey is not a contact sport for purposes of Title IX regulation that otherwise permits cross-sex tryouts); Associated Press, *New York Boy Can Play Field Hockey*, ESPN (May 15, 2012), http://espn.go.com/new-york/story/_/id/7933109/new-york-boy-keeling-pilaro-play-girls-field-hockey-team; Todd C. Frankel, *What To Do When a Eureka Boy Wants To Play a ‘Girls Sport’?*, ST. LOUIS POST-DISPATCH (Mar. 30, 2014), http://www.stltoday.com/news/local/education/what-to-do-when-a-eureka-boy-wants-to-play/article_4fbed7a-6083-50dc-983d-4fa16602c096.html.

concerns about testosterone will not make sports “fair,” when variations in size, strength, talent, and experience still operate to place some competitors at an advantage over others. Nor will her presence in the game automatically render it unfair, since it is equally possible that the other competitors have compensatory advantages of their own, like the basketball player who is taller than average, the swimmer with a massive wingspan, and the soccer player whose family could afford to send her to sports camps in the summer.

The only eligibility criteria that a policy should include is whether the athlete’s stated gender identity is “bona fide,” as the Massachusetts and Connecticut athletic associations’ policies say.¹⁹¹ This criterion provides the legal basis on which to distinguish between a transgender girl and the possibility, however remote, of a boy pretending to be a girl in order to participate in girls’ sports.¹⁹² Just as policies should not exclude transgender athletes based on hormone status, they should not contain language expressly or impliedly permitting school or association officials to exclude athletes for reasons related to safety and competitive equity¹⁹³ or for vaguely stated “[g]ender identity related advantages.”¹⁹⁴ Like hormone policies, these exclusions uniquely and unfairly target transgender students for exclusion based on criteria that could just as easily be present in other non-transgender athletes. The policies permit administrators to exercise boundless discretion in determining an athlete’s eligibility and do nothing to prevent the influence of bias and stereotypes on the decision at hand.¹⁹⁵

191. CONN. POLICY, *supra* note 59, at 56; MASS. POLICY, *supra* note 60.

192. Skinner-Thompson & Turner, *supra* note 106, at 289. Despite prevailing social anxiety about men masquerading as women for nefarious sport purposes, there are almost no actual examples of this occurring in real life. The only documented example is that of Hermann Ratjen, whom the Nazis forced to disguise himself as a woman and compete for Germany in the women’s high jump in the 1936 Olympics (he placed fourth). Christopher Hilton, *Amazing Tale of Man Called Hermann Who Finished Fourth in Women’s High Jump*, INDEPENDENT (July 19, 2008), <http://www.independent.co.uk/sport/general/athletics/amazing-tale-of-man-called-hermann-who-finished-fourth-in-womens-high-jump-872322.html>. Relatedly, while there has been suspicion that female Olympic athletes have taken testosterone for an athletic advantage, these cases also appear to have resulted from the compulsory practices of sinister Cold War regimes. See Sheila L. Cavanaugh & Heather Sykes, *Transsexual Bodies at the Olympics: The International Olympic Committee’s Policy on Transsexual Athletes at the 2004 Athens Summer Games*, 12 BODY & SOC’Y 75, 83 (2006).

193. See ME. POLICY, *supra* note 47, at 19; N.J. POLICY, *supra* note 48, at 84.

194. See ILL. POLICY, *supra* note 49, at 120; KAN. POLICY, *supra* note 50, at 1.

195. For example, an administrator may be tempted to exclude a transgender girl who is taller than the average height for non-transgender girls, having concluded that her height is a gender-related advantage. But height is a

In sum, state athletic associations and other entities that regulate youth sports should not condition gender-consonant participation on an athlete’s status with cross-sex hormones or perception of gender-related advantages. Especially where athletic opportunities are part of an institution’s educational mission, eliminating actual barriers to participation should rightly take priority over vague and often stereotype-based assumptions about gender and competitive advantages.

D. Hormone Policies and Other Gender-Consonant Policies with Restrictions and Limitations Conflict with Title IX and Anti-Discrimination Laws in Many States

The arguments laid out above against birth certificate policies—that by foreclosing gender-consonant participation, they violate transgender athletes’ rights under Title IX and state anti-discrimination laws¹⁹⁶—apply with similar force to policies that only permit gender-consonant participation by those athletes who have undergone treatment with cross-sex hormones, or who otherwise exhibit no “gender-related advantages” or do not threaten competitive equity or safety. The apparent rationale behind conditions and limitations like these is to ensure that non-transgender athletes are not disadvantaged or placed in danger by competing with or against individuals whose bodies may be different as a result of their transgender status.

However, this rationale is inconsistently applied. Thus, courts can legally discount such arguments as pretext for discrimination against transgender athletes, and, as such, as violating Title IX and/or the Equal Protection Clause, as well as any state laws prohibiting discrimination on the basis of gender identity.¹⁹⁷ For example, athletic associations in Illinois and Kansas permit exclusion of transgender athletes with “gender-related advantages,” in an apparent effort to promote competitive equity and safety.¹⁹⁸ It is conceivable that an association would consider a transgender girl who is taller than average to have a gender-related advantage because boys are generally taller than girls. However, those associations do not restrict the participation

generalized gender difference, not a categorical one. Some natal females are taller than some natal males. There is no way for an administrator to isolate the athlete’s natal sex as the cause in fact of her tallness, since the possibility that even if she had been born a non-transgender female she would still be tall, cannot be ruled out.

196. See *supra* Part II.B.

197. See *supra* Part II.B.

198. ILL. POLICY, *supra* note 49, at 120; KAN. POLICY, *supra* note 50, at 1.

of other tall girls, even though they would pose the same threat to competitive equity and safety.¹⁹⁹ Therefore, the policy permits excluding a transgender girl for no other reason than that she is transgender. This is both sex discrimination and discrimination on the basis of gender identity.

It is not surprising, therefore, that regulators directly considering the applicability of gender-identity nondiscrimination statutes to athletics have found no reason to condition transgender students' rights to gender-consonant access or participation on whether or not they have undergone a hormonal transition or have physical characteristics that are atypical for their affirmed gender. For example, after legislatures in Massachusetts and Connecticut added gender identity to state laws prohibiting discrimination in education, state agencies promptly issued regulatory guidance clarifying that schools must permit gender-consonant athletic participation in all cases.²⁰⁰ Limitations and conditions on gender-consonant participation are therefore most vulnerable in states with similar discrimination statutes, including those whose athletic associations permit schools to exclude transgender athletes from gender-consonant participation in the name of competitive equity and safety (Maine²⁰¹ and New Jersey²⁰²), because of "gender-related advantages" (Illinois²⁰³), and in the absence of treatment with cross-sex hormones (Oregon²⁰⁴).

IV. Maximizing Inclusivity of Gender-Consonant Policies

Thus far, this Article has established that policies excluding or otherwise limiting transgender athletes from gender-consonant participation are harmful to transgender individuals, inconsistent with prevailing medical understandings of gender identity, unnecessary for purposes of competitive equity and other purported rationales, and invalid as a matter of civil rights law. This Part turns to gender-consonant policies and suggests ways they can be improved to maximize the inclusion they seek to achieve.

199. See ILL. POLICY, *supra* note 49; KAN. POLICY, *supra* note 50.

200. CONN. SAFE SCH. COAL., *supra* note 144, at 8–9; MASS. DEPT OF ELEMENTARY & SECONDARY EDUC., *supra* note 144, at 10.

201. ME. POLICY, *supra* note 47, at 19.

202. N.J. POLICY, *supra* note 48, at 83–84.

203. ILL. POLICY, *supra* note 49, at 120.

204. OR. POLICY, *supra* note 40, at 98.

A. *Gender-Consonant Policies Should Minimize Procedural Obstacles to Participation*

First, gender-consonant participation policies should seek to minimize the procedural barriers to participation that could deter transgender youth from pursuing athletic opportunities. Athletic associations and youth sports programs may have valid reasons to incorporate a process for verifying a transgender student's affirmed gender-identity claim into their gender-consonant policy. Such processes reassure stakeholders that there is a forum in which to address any abuse of the policy, should it occur. However, the timeline of such processes, how they are initiated, and the evidentiary burdens they place on athletes are all aspects that policymakers should consider in seeking to eliminate unnecessary procedural barriers to participation.

Existing gender-consonant policies provide different processes for gender identity verification. Virginia's interscholastic athletic association,²⁰⁵ as well as those in Maine²⁰⁶ and Illinois,²⁰⁷ requires transgender athletes to undergo a gender-identity verification process as a prerequisite to gender-consonant participation. Other gender-consonant participation policies, such as Washington state's, hold off on the verification process until “questions arise.”²⁰⁸ Virginia's front-loaded process requires multiple levels of review to approve the student's request before the student can participate;²⁰⁹ however, Washington's policy permits but does not require appellate review.²¹⁰ These two facets of Virginia's policy threaten to deter transgender athletes, who may be intimidated by the procedural hurdles they are required to overcome, from participating. Virginia's policy essentially puts transgender athletes in the position of having to defend their requests, whereas Washington's policy and others like it extend a presumption of validity to athletes' stated gender identities. For this reason, in practice, Virginia's policy is more likely than Washington's to deter the very participation permitted by the policy.

A third procedure for gender-identity verification can be seen in those athletic association policies that defer to school officials' conclusions. For example, athletic associations in

205. VA. POLICY, *supra* note 66, at 108–10.

206. ME. POLICY, *supra* note 47, at 19.

207. ILL. POLICY, *supra* note 49, at 119–20.

208. WASH. POLICY, *supra* note 67, at 31–32.

209. VA. POLICY, *supra* note 66, at 108–110.

210. WASH. POLICY, *supra* note 67, at 31–32.

Massachusetts²¹¹ and Connecticut,²¹² do not have gender identity committees that verify conclusions made by school officials as to whether students' gender-identities claims are valid. This decentralized process can benefit transgender students by minimizing procedural barriers to participation. However, the downside of such deference is that the athletic association is unable to provide recourse to a transgender student whose principal or athletic director does not support gender-consonant participation. While this is not as much a concern in Massachusetts and Connecticut because those states clearly express a student's enforceable right to gender-consonant participation as a matter of state law,²¹³ in other states where that clarity has not yet been attained, a transgender student might need an opportunity to appeal the gender-identity verification process to the athletic association level.

Gender-identity verification processes may also differ through the evidentiary requirements that they may impose on students. For example, the Virginia athletic association's policy is unique among gender-consonant policies in requiring the student to present evidence from a medical provider corroborating the student's asserted gender identity.²¹⁴ This evidence may be difficult for some students to obtain because of the high cost and limited availability of transgender-friendly health care.²¹⁵ Moreover, medical corroboration is unnecessary because a gender-consonant policy focuses the decision-maker's inquiry on whether or not the student's request was made in good faith. Many individuals who are not medical providers can vouch for a student's character; thus, a better policy approach in the event of a challenge is to permit the student to present corroborating evidence in the form of statements from anyone who knows the student well—including medical providers, but also people like parents, teachers, pastors, and social workers.

*B. Gender-Consonant Policies Should Address Other
Aspects of Inclusion*

Several state interscholastic athletic associations include in their policies a set of guidelines or "areas of awareness" that suggest other ways that member schools should support gender-

211. See MASS. DEPT OF ELEMENTARY & SECONDARY EDUC., *supra* note 144.

212. See CONN. SAFE SCH. COAL., *supra* note 144.

213. See *supra* Part III.D.

214. VA. POLICY, *supra* note 66, at 108–10.

215. See Olson, *supra* note 177.

consonant participation.²¹⁶ Typical examples include “us[ing] correct names/pronouns according to the student’s gender identity,”²¹⁷ “permit[ting] the student to dress according to gender identity,”²¹⁸ and providing “gender appropriate restroom accessibility”²¹⁹ and reasonably “accommodat[ing] equitable locker room accessibility.”²²⁰ Although these guidelines are collateral to the issue of one’s eligibility to play, they are necessary to ensure that an athlete feels safe and comfortable exercising their right to participate as provided in the policy. By including guidelines like these in their policies, state interscholastic athletic associations help raise member schools’ awareness about the legal obligations they already face under Title IX and, possibly, state law.²²¹

V. Conclusion: An Annotated Model Policy

In order to ensure that transgender youth and adolescents have the opportunity to participate in athletics as “who they really are,” athletic associations and national governing bodies of sport should permit gender-consonant participation without conditions or limitations, while also minimizing whatever process might be necessary to validate the student’s affirmed gender identity. To that end, this Article now concludes with a proposed model policy geared towards athletic associations that want to avoid the harmful and illegal aspects of the policies discussed in Parts II and III and that want to maximize inclusion in the manner proposed in Part IV. Explanatory language provided in the footnotes is meant to help the reader, not to be included in the policy as adopted.

PHILOSOPHY OF GENDER IDENTITY PARTICIPATION²²²

216. See COLO. HIGH SCH. ACTIVITIES ASS’N, TRANSGENDER PROCEDURE AND POLICY (2013) [hereinafter COLO. POLICY], http://media.wix.com/ugd/2bc3fc_eeb01ddea851116f11c35760e11424e5.pdf; Reist, *supra* note 42 (outlining Nebraska’s proposed policy).

217. COLO. POLICY, *supra* note 216, at 3.

218. *Id.*

219. *Id.*

220. *Id.*

221. See *supra* Part II.B.1 (discussing the Department of Education’s position that Title IX requires schools to permit transgender students to use sex-segregated facilities, like locker rooms, consistent with their gender identities); see also Letter from Adele Rapport, *supra* note 136 (discussing a school district’s violation of Title IX for excluding a student from participation and generally treating the student differently on the basis of sex).

222. It can be helpful for a policy to articulate an overarching principle of inclusion to create context for readers to understand the policy. However, such statements should appear under their own heading in order to be clearly delineated from the policy itself. Such statements should not include language that the policymakers do not want to be literally construed as a policy requirement. The

The [state athletic association] believes that athletic participation is valuable to students' physical, intellectual, social, and character development and, accordingly, we value inclusion. Guided by this value, our policy permits transgender students' athletic participation in a manner consistent with each student's gender identity.²²³

POLICY PERMITTING GENDER IDENTITY-BASED PARTICIPATION

All students should have the opportunity to participate in [state athletic association] activities in a manner that is consistent with their gender identity, irrespective of the gender listed on a student's records and without prior medical or mental health care.

1. Eligibility to participate. A student has the right to participate in athletics in a manner consistent with the sex listed on that student's school records.²²⁴ A student whose gender identity is different than the sex listed on the student's registration records may participate in a manner consistent with the student's gender identity in accordance with the policy below.²²⁵

2. Notice to the school. The student and/or parents shall contact the school administrator or athletic director indicating that the student has a gender identity different from the sex listed

ambiguity of Maryland's policy, see *supra* text accompanying notes 50, 51, could have been avoided by either omitting background information that informed the policy or clearly identifying the information as background and not policy.

223. Some existing athletic association policies include a definition section. This model policy, by contrast, strives to avoid terms for which definitions are needed. If policymakers prefer to include a list of defined terms, it is recommended to limit that list to words or concepts that are included in the policy itself.

224. Depending on state law and school district policy, some transgender students may have had the opportunity to enroll according to their affirmed gender or to have updated school records to include their correct gender marker. This sentence secures the rights of such transgender students to participate in athletics according to the gender identity already reflected in their school records.

For transgender students whose gender identity differs from the sex listed in their school records, this sentence establishes their right to participate in athletics according to their birth-assigned sex, should they decide that such participation is a better fit for them. See *supra* Part III.B. (discussing the reasons transgender boys might wish to remain in girls' sports).

225. School records are often consistent with birth records because it is common for school districts to require students to present birth certificates as part of the enrollment process. This sentence secures the right of transgender students to participate in athletics according to their gender identities, even if their identities differ from the gender indicated on school records.

on the student’s school registration records, and that the student desires to participate in activities in a manner consistent with the student’s gender identity.²²⁶

- a. Note: a student is presumed eligible to participate in [state athletic association] activities in a manner consistent with the student’s school registration records, even if that differs from the sex assigned at birth. Such a student is not required to provide notice under this subpart.²²⁷

3. Notice to the [state athletic association]. Upon receiving notice under subpart 1, a school administrator should inform the [state athletic association] [insert specific person’s title] of the student’s intent to participate in activities in a manner consistent with the student’s gender identity, as opposed to the sex listed on the student’s school registration records.²²⁸

4. Determination proceeding. Should the [state athletic association] receive a timely petition from a member institution challenging a student’s participation in a sex-segregated activity consistent with the student’s gender identity, or, although not required, a student seeks to preemptively confirm that student’s eligibility, the [state athletic association] will review that student’s eligibility for participation in accordance with the procedure set forth below²²⁹:

226. The requirement that a transgender student provide notice of the student’s intent to engage in gender-consonant athletic participation is intended to help the student by providing school officials with the relevant information required to ensure that the student’s right is secured. In the interest of minimizing participation barriers, policies should not impose additional requirements beyond notice.

227. This is an explanatory note clarifying that the notice requirement in the prior sentence only applies to those transgender students whose gender identity is not already reflected in school records. For transgender students whose gender identities are reflected on school records, a requirement to provide notice at the outset of athletic participation is duplicative of the process they went through to change their gender marker on school records, and thus redundant.

228. The requirement that school officials provide notice to the state interscholastic athletic association is designed to help the student whose gender-consonant participation may raise questions or generate complaints directed at association officials.

229. A determination proceeding should not be a threshold requirement for transgender student’s gender-consonant participation because of the potential chilling effect that it may have on participation. However, in the event that a student’s participation is disputed, it is important for a policy to include clear steps about how to resolve such a dispute. Additionally, policies should permit a transgender student to seek a preemptive determination hearing. Students may

- a. The [state athletic association] will convene an eligibility committee specifically established to hear gender identity appeals. The Gender Identity Eligibility Committee²³⁰ will be comprised of a minimum of three of the following persons, one of whom must be from the physician or mental health profession category:
 - i. Physician with experience working with youth whose gender identity differs from the sex they were assigned at birth and who is familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care and other standard-setting documents;
 - ii. Licensed mental health provider with experience working with youth whose gender identity differs from the sex they were assigned at birth and who is familiar with the World Professional Association for Transgender Health (WPATH) Standards of Care and other standard-setting documents;
 - iii. School administrator from a non-appealing school;
 - iv. [State athletic association] staff member;
 - v. Gender-affirming advocate familiar with issues affecting youth whose gender identity differs from the sex they were assigned at birth.²³¹

want to exercise this option if they wish to preempt any anticipated negative responses to their participation.

230. The opportunity to appeal to a committee can protect a student's opportunity to participate in the event the student receives an unfavorable determination from the school administrator or athletic director. While not necessary in states that already provide an enforceable right to gender-consonant participation, this procedural safeguard is warranted elsewhere.

231. This list of possible committee members is already common to many gender-consonant participation policies. *See supra* note 71 and accompanying text (describing Washington state's policy). Committee members should include a medical or mental health care provider as a means of ensuring that the legitimacy of a transgender experience is taken into consideration. Their inclusion on the committee also helps ensure that its decision in favor of the student is credible to those who initiated the challenge.

- b. The committee shall conduct a hearing as expeditiously as possible, but no later than five (5) school business days prior to the first full interscholastic contest that is the subject of the petition. In the case of an emergency, the hearing shall be held within a reasonable time after the petition challenging a student's eligibility has been filed.²³²
- c. The student shall have the opportunity to provide the committee with the following documentation:
 - i. Current transcript and school registration information;
 - ii. Documentation of the student's consistent gender identification (e.g., affirmed written statements from the student and/or the student's parent(s)/guardian(s) and/or health-care provider(s)); and
 - iii. Any other pertinent documentation or information.²³³
- d. If the Gender Identity Eligibility Committee finds that the student's gender identity is sincere, i.e., is not motivated by an improper purpose, then the student shall be declared eligible to continue participating in sex-segregated activities consistent with the student's gender identity.²³⁴ This determination of eligibility will be in force for the duration of the student's participation

232. Because a determination proceeding will raise disruptive uncertainty about the student's continued participation, it is important that the process conclude as quickly as possible.

233. Not all transgender students have access to gender-affirming medical care. Accordingly, a student should not be required, but should be permitted, to submit evidence from a medical provider. Moreover, a medical provider does not have a unique insight into the issue to be determined by the committee, which is whether a student's assertion of gender identity is sincere. Persuasive evidence that the student is acting in good faith can come from other individuals who know the student well.

234. Here, the policy makes clear that the only inquiry before the committee is whether the student's asserted gender identity is sincere. The committee is not permitted to consider or make exceptions based on considerations like safety or competitive advantage, for the reasons discussed above. *See supra* Part III.C (arguing that the policies seeking to permit exclusions for safety and competitive reasons are not justified for their stated purposes).

and does not need to be renewed every sports season.²³⁵

- e. Either the student or the petitioner may appeal an adverse outcome. The appealing party must file a notice of appeal with the Executive Director of the [state athletic association] within ten (10) school business days following the date of the written decision of the Gender Identity Eligibility Committee. Upon receiving an appeal, the Executive Director will schedule a hearing to commence within ten (10) school business days following the date of receipt of the written notice of appeal. Written notice of the time and place of the hearing shall be delivered to all parties in person or by certified mail, with return receipt requested, no later than five (5) school business days prior to the date of the hearing.²³⁶

5. Confidentiality. With the exception of the notice required in subpart 2 of this policy and the hearing allowed in subpart 3, students affected by this policy have the right to confidentiality in all matters governed by this policy. School administrators and [state athletic association] officials shall respect this confidentiality unless and to whatever extent it might be waived by the student.²³⁷

ADDITIONAL GUIDELINES.²³⁸

The [state athletic association] endorses the following guidelines to ensure the nondiscriminatory treatment of transgender students participating in [state athletic association] activities.²³⁹

235. By ensuring that the committee's determination is durable, this language eliminates the threat of reduced participation caused by forcing a student to go through the process again.

236. A right to appeal allows for the opportunity to correct an erroneous determination made by the committee. Alternatively, when a committee's determination is upheld, the appellate process lends credibility to the determination.

237. Confidentiality—subject to the necessary exceptions for complying with the notice requirement and the possibility of a determination proceeding—helps minimize the risk that the threat of widespread disclosure would operate as an obstacle to participation.

238. These guidelines are adapted from the NCAA. *See* GRIFFIN & CARROLL, NCAA INCLUSION, *supra* note 35, at 20–21. While several existing athletic association policies offer guidance on these topics as well, the NCAA's language most clearly conveys the best practice standard.

239. This policy presents these additional considerations as guidelines out of

1. Changing Areas, Toilets, Showers. A transgender student-athlete should be able to use the locker room, shower, and toilet facilities in accordance with the student’s gender identity. Every locker room should have some private, enclosed changing areas, showers, and toilets for use by any athlete who desires them. When requested by a transgender student-athlete, schools should provide private and separate changing, showering, and toilet facilities for the student’s use, but transgender students should not be required to use separate facilities.²⁴⁰

2. Hotel Rooms. Transgender student-athletes generally should be assigned to share hotel rooms based on their gender identity, with a recognition that any student who needs extra privacy should be accommodated whenever possible.

3. Language. Preferred names and pronouns. A transgender student may prefer a name and gender pronouns that are different from what may be indicated by the student’s school records. Coaches, administrators, and officials shall make every reasonable effort to honor that student’s preferred name and pronouns and to ensure that the student’s name and pronoun preferences are respected by others including teammates, opponents, fans, volunteers, announcers, etc. This guideline applies not only for transgender students who seek to participate in state athletic association activities in a manner consistent with their gender identity, but also to those whose participation is consistent with the sex on their school records.

4. Dress codes and team uniforms. All team members should have access to uniforms that are appropriate for their sport and that they feel comfortable wearing. No student should be required to wear a gendered uniform that conflicts with the student’s gender identity. Dress codes for athletic teams when traveling or during a game day at school should be gender-neutral. (For example, instead of requiring a girls’ or women’s team to wear

recognition for the increased enforcement burden on state athletic associations that would result if these rules were mandatory. Moreover, some of these guidelines are consistent with requirements under Title IX and state law, so a school that does not adhere to these guidelines risks the possibility of litigation and government enforcement.

240. The Department of Education takes the position that Title IX requires schools to permit transgender students to use sex-segregated facilities like locker rooms consistent with their gender identities. See Letter from Adele Rappaport, *supra* note 136.

dressess or skirts, ask that team members wear dresses or slacks that are clean, neat, well cared for and appropriately “dressy” for representing their school and team.)

5. Competition at Another School. Without violating a transgender student’s confidentiality or privacy, school leaders, athletic directors, and coaches should communicate with their counterparts at other schools prior to competitions in which a transgender athlete is participating to discuss expectations for treatment of transgender student-athletes on and off the field, including to ensure that the student will have access to appropriate changing, showering, and/or bathroom facilities, and to request the use of preferred names and pronouns by coaches, opponents, officials, announcers, fans, and media.